158-271

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 272.

THE NORTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ALFRED J. URLIN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

FILED AUGUST 19, 1891.

(14,811.)

(14,811.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 272.

THE NORTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ALFRED J. URLIN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

INDEX.

	Original.	Print.
Citation	1	1
Marshal's return	2	1
Writ of error	2½	1
Caption	4	2
Motion to transfer cause	5	3
Order transferring cause	6	3
Complaint	8	4
Summons	13	7
Marshal's return	15	8
Order granting leave to file amended answer	16	9
Amended answer	17	9
Order setting cause for trial	20	11
Order resetting cause for trial	21	11
Order beginning trial	21	11
Orders continuing trial	22	12
Order concluding trial	23	13
Verdict	24	13
Findings of fact	25	14

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 28, 1894.

	Original.	Print.
Order for judgment	26	14
Judgment	27	15
Order granting time to file bill of exceptions	29	16
Bill of exceptions	30	17
Exceptions to deposition of Calvin De Witt	30	17
Dr. W. P. Mills	31	17
Dr. De Witt	37	21
Plaintiff	37	21
Patrick Toner	41	23
George Anthony	42	24
Dr. J. B. Atchison	43	25
C. W. Lombard	45	26
Dr. L. H. Choquette	46	26
Plaintiff	47	27
Defendant's requests to charge	48	27
Charge to jury	48	28
Judge's certificate to bill of exceptions	56	32
Proof of service of bill of exceptions	56	32
Motion for new trial	58	33
Order overruling motion for new trial	62	36
Assignment of errors	63	36
Bond on writ of error	67	38
Clerk's certificate	69	39

1 UNITED STATES OF AMERICA, *ss:*

To Alfred J. Urlin and Mess. Woody & Webster, his attorneys, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 12th day of October, A. D. 1891, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Montana, wherein The Northern Pacific Railroad Company is plaintiff and you, the said Alfred J. Urlin, are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville Weston Fuller, Chief Justice of the Supreme Court of the United States, this 29th day of June, A. D. 1891, and of the Independence of the United States the one hundred and 15th.

HIRAM KNOWLES, *Judge.*

[Endorsed:] In the Supreme Court of the United States. Northern Pacific Railroad Company, pl'ff in error, *vs.* Alfred J. Urlin, def't in error. Citation.

2 *Marshal's Return.*

I have served this writ personally on Woody & Webster, attorneys for plaintiff in error, A. J. Urlin, by delivering to and leaving with said Woody & Webster a true copy thereof at Missoula county, Montana, this 6th day of July, 1891.

W. F. FURAY,
U. S. Marshal,
By T. J. McCLUNG, *Deputy.*

2½ UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of the ninth judicial circuit in and for the district of Montana, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The Northern Pacific Railroad Company, plaintiff in error, and Alfred J. Urlin, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United

States of America, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid beinspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 29th day of June, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and 15th.

Seal United States Circuit Court, District of Montana, 1890.

GEORGE W. SPROULE,
Clerk Circuit Court of the United States,
9th Circuit, District of Montana.

The above writ of error is hereby allowed.
HIRAM KNOWLES,
U. S. Dist. Judge.

3 [Endorsed:] United States Supreme Court. Northern Pacific Railroad Company, pl'ff in error, *vs.* Alfred J. Urlin, def't in error. Writ of error. Copy deposited for the defendant in error in the clerk's office U. S. circuit court, 9th circuit, district of Montana.

The Answer of the Judges of the Circuit Court of the United States for the Ninth Circuit for the District of Montana.

The record and all proceedings of the plaintiff wherein mention is within made, with all things touching the same, we certify, under the seal of our said court, to the Supreme Court of the United States of America within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[Seal United States Circuit Court, District of Montana, 1890.]

GEORGE W. SPROULE, *Clerk.*

4 In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

ALFRED J. URLIN, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Be it remembered that on the 3rd day of June, A. D. 1890, defendant herein filed its motion to transfer this cause from the State court; which said motion is in words and figures following, viz:

5 In the District Court of the Third Judicial District of the State of Montana within and for Deer Lodge County.

A. J. URLIN, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Now comes the defendant, The Northern Pacific Railroad Company, and respectfully shows to this court—

That this cause was pending in this court at the date of the admission of this State into the Union, and that it is a cause whereof the circuit court of the United States might have had jurisdiction under the laws of the United States had the said court existed at the time of the commencement of said case.

Wherefore the defendant now requests that the said cause and all the files, records, and proceedings pertaining thereto be transferred to the circuit court of the United States for the district of Montana.

CULLEN, SANDERS & SHELTON,
Att'ys for Defendant.

(Endorsed:) #115. In 3rd judicial dist. court, Deer Lodge county, Montana. A. J. Urlin *vs.* N. P. R. R. Co. Motion. Filed May 31, 1890. Welling Napton, clerk. Cullen, Sanders and Shelton, att'ys for defendant. Also No. 54. In the circuit court of the United States, ninth circuit, district of Montana. A. J. Urlin *vs.* N. P. R. R. Co. Motion. Filed Jun- 3, 1890. Geo. W. Sproule, clerk, by W. J. Kennedy, dep-ty clerk.

And thereafter and on said day also filed the order of said State court transferring said cause; which said order is in the words and figures following, viz:

6 In the District Court of the Third Judicial District of the State of Montana within and for Deer Lodge County.

A. J. URLIN, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

A request in writing having been made by the defendant in the above-entitled action to transfer the same to the circuit court of the United States, and it appearing to this court that the said cause was pending at the date of the admission of this State into the Union, and that the same is a cause whereof the said circuit court of the United States for the district of Montana might have had jurisdiction had the said court been in existence at the date of the commencement of this action:

Now, therefore, it is ordered that this cause be immediately transferred to the said circuit court of the United States for the district

of Montana, and that the clerk of this court transmit the same to the clerk of said circuit court, with a copy of this order.

Dated May 31, A. D. 1890.

D. M. DURFEE, *Judge.*

(Endorsed:) # 115. In 3rd judicial dist. court, Deer Lodge county, Montana. A. J. Urlin *vs.* N. P. R. R. Co. Order. Filed May 31, 1890. Welling Napton, clerk. Cullen, Sanders and Shelton, att'ys for defendant. Also No. 54. In the circuit court of the United States, ninth circuit, district of Montana. A. J. Urlin *vs.* N. P. R. R. Co. Order. Filed Jun- 3, 1890. Geo. W. Sproule, clerk, by W. J. Kennedy, dep-ty clerk.

7 And on said day the complaint in said cause was filed herein; which said complaint is in the words and figures following, to wit:

8 In the District Court of the Second Judicial District of Montana Territory, Sitting in the County of Silver Bow for the Trial and Determination of Causes Arising under the Constitution and Laws of the United States.

ALFRED J. URLIN, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The plaintiff complains of the above-named defendant, The Northern Pacific Railroad Company, and for cause of action alleges—

That at all the times hereinafter mentioned the defendant was and now is a corporation created and existing by and under an act of the Congress of the United States approved July 2nd, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound, on the Pacific coast, by the northern route," and the acts of Congress amendatory of said act, and as such corporation was the owner of a certain railroad known as the Northern Pacific railroad, together with the track, rolling stock, and other appurtenances thereunto belonging, and as such corporation was running and operating said railroad and was a common carrier of passengers for hire thereupon between the town of Missoula, this Territory, on the line of said road, and a station known as and called Garrison, on the line of said railroad in this Territory.

That on or about the 1st day of July, 1888, the plaintiff purchased of the defendant, at its station at the said town of
9 Missoula, a ticket which entitled him to be carried as a passenger in the cars of said defendant on and over the line of its said railroad between the said town of Missoula and said station called Garrison, paying to the said defendant the usual price of said ticket and the price demanded therefor, and that in consideration of the purchase of the said ticket and of the price paid therefor the said defendant then and there received said plaintiff as such passenger to be carried in its cars on the said railroad of the

said defendant over and along the line of the said defendant's railroad aforesaid between the town of Missoula and the station called Garrison, and it then and there became and was the duty of the said defendant, as such common carrier, to use all due and proper care that the said plaintiff should be safely and securely carried and conveyed in its said cars on and over the line of its said railroad from the said town of Missoula to said station called Garrison; yet the said defendant, not regarding its duty in that behalf, did not use due and proper care and diligence that the said plaintiff should be safely and securely carried and conveyed as such passenger as aforesaid in its said cars over and upon its said railroad on said journey from said town of Missoula to said station called Garrison, but wholly neglected so to do, and carelessly and negligently allowed, suffered, and permitted a portion of the track of its said railroad at or near a place on the line of said railroad called Gold Creek and between the said town of Missoula and said station called Garrison to be and remain in a defective, bad, unsafe, and dangerous condition, in that the said defendant had carelessly and negligently allowed, suffered, and permitted the cross-ties used in the construction of its said railroad track at the place last aforesaid to be
10 and remain in a defective, decayed, and rotten condition, and that said cross-ties were in said defective, decayed, and rotten condition at the place last aforesaid at the time of the grievances hereinafter mentioned, to wit, on or about the 1st day of July, 1888.

The plaintiff further alleges that on the 1st day of July, 1888, and while the plaintiff was in one of the defendant's cars as such passenger as aforesaid, and while being carried and conveyed over the plaintiff's said railroad as such passenger between the said town of Missoula and said station called Garrison, and while the train of cars on which the plaintiff as such passenger was passing over that portion of said defendant's said railroad hereinbefore mentioned and described as being in a bad, unsafe, and dangerous condition by reason of the defective, decayed, and rotten condition of said cross-ties, and at or near a place on said railroad called Gold Creek, the said defendant, by its agents, servants, and employés, handled, managed, and conducted said train of cars in such a careless and negligent manner over and across said dangerous portion of said defendant's railroad that a portion of the cars composing said train of cars, and including the car in which this plaintiff was seated and being carried and conveyed as a passenger as aforesaid, *were*, without any fault or negligence of this plaintiff, run off the said railroad track, derailed, and thrown down an embankment and overturned, whereby and by means of which this plaintiff was, without any fault or negligence on his part, crushed, bruised, mangled, wounded, one of his teeth was fractured and broken, his ribs in his left side were fractured and broken, and he otherwise received severe and dangerous wounds and internal injuries, and also by means of the premises the said plaintiff became and was sick, sore, disabled, and was confined to his bed for a period of about two
11 months, and so remained sick, sore, wounded, and disabled from the said 1st day of July, 1888, up to the time of the com-

mencement of this action, during all of which said time the said plaintiff has suffered and still continues to suffer great bodily pain and mental anguish, and that in consequence of said injuries so received as aforesaid his general health has been ruined and he is permanently disabled and rendered totally unable to attend to any kind of business pursuits and deprived of the comfortable enjoyment of life.

That by reason of the injuries received at the time, place, and in the manner aforesaid he has been damaged in the sum of fifty thousand dollars.

The plaintiff further alleges, by way of special damages, that at the time that he received the injuries complained of as aforesaid he was engaged in the business of a merchant, buying, selling, and shipping groceries, provisions, fruits, and vegetables, at the town of Missoula, this Territory, and that his said business as aforesaid yielded and paid him a sum equal to one hundred dollars per month; that by reason of the injuries so received as aforesaid he became and was disabled, and so continues to be, to such a degree that he could not and cannot now attend to his said business as aforesaid, and has been compelled to relinquish and discontinue the same, and his said business has been wholly destroyed; by reason of which he has been and is now damaged in the sum of five hundred dollars.

Wherefore the plaintiff prays judgment against the defendant for the sum of fifty thousand dollars general damages and for the further sum of five hundred dollars special damages, and also for his costs in this behalf expended.

WOODY & WEBSTER,
Attorneys for Plaintiff.

12 TERRITORY OF MONTANA, } ss:
County of Missoula, }

Alfred J. Urlin, being first duly sworn, says that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the facts therein stated are true to his own knowledge except as to those matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

ALFRED J. URLIN.

Subscribed and sworn to before me this 28th day of November, A. D. 1888.

FRANK H. WOODY,
[SEAL.] *Notary Public.*

(Endorsed:) No. 156. Alfred J. Urlin *vs.* The Northern Pacific Railroad Company. Complaint. Filed December 3rd, 1888. Frank E. Corbett, clerk. Woody and Webster, attorneys for plaintiff. Also No. 54. In the circuit court of the United States, ninth circuit, district of Montana. Alfred J. Urlin *vs.* The Northern Pacific Railroad Company. Complaint. Filed Jun- 3, 1890. Geo. W. Sproule, clerk, by W. J. Kennedy, dep-ty clerk.

And at said time and on said day, to wit, June 3rd, 1890, the summons issued in said cause, with the return of service endorsed thereon, was duly filed; which said summons and return are in the words and figures following, viz:

13 In the District Court of the 2nd Judicial District of the Territory of Montana, Sitting as a Court for the Trial of Causes Arising under the Constitution and Laws of the United States.

ALFRED J. URLIN, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Action brought in the district court of the 2nd judicial district of the Territory of Montana, sitting as a court for the trial of causes arising under the Constitution and laws of the United States, and the complaint filed in the office of the clerk of said court.

The President of the United States of America sends greeting to The Northern Pacific Railroad Company, defendant:

You are hereby required to appear in action brought against you by the above-named plaintiff in the district court of the 2nd judicial district of the Territory of Montana, sitting as a court for the trial of causes arising under the Constitution and laws of the United States, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons if served within Silver Bow county, or if served out of said county, but in this district, then within twenty days; otherwise within forty days, or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought to obtain a judgment against
14 you for the sum of fifty thousand five hundred dollars as general and special damage alleged to have been sustained by plaintiff by reason of personal injuries received by plaintiff on or about the 1st day of July, A. D. 1888, on the line of defendant's railroad, to wit, at Gold Creek, between the town of Missoula and a station called Garrison, by reason of the negligence and carelessness of defendant, by its agents, servants, and employees, in failing to keep its R. R. track in good condition at said Gold Creek, by reason of which negligence & carelessness as aforesaid plaintiff sustained personal injuries on said date, at said place, by reason of the cars of said defendant leaving the track, plaintiff being a passenger on said R. R. at said time and place. Said sum is sued for, as follows: For general damages, $50,000.00; for special damages, $500.

This action is also brought for costs of suit; all of whi- will more fully appear by reference to complaint on file herein, as will more fully appear by reference to the complaint on file herein.

And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff will apply to the court for the relief demanded in the complaint.

Witness the Hon. Stephen De Wolfe, judge of the said district court, and the seal of the said court hereunto affixed, at my office, in Butte City, Silver Bow county, M. T., in the said district and Territory, on this fourth day of December, in the year of our Lord one thousand eight hundred and eighty-eight.

[SEAL OF COURT.] FRANK E. CORBETT, *Clerk.*

15 (Endorsed:) No. 156. United States district court, 2nd judicial district, Territory of Montana. Alfred J. Urlin, plaintiff, *vs.* Northern Pacific R. R., defendant. Summons. Woody and Webster, pl'ff's attorney. Filed Dec. 12th, 1888. Frank E. Corbett, clerk. Also No. 54. In the circuit court of the United States, ninth circuit, district of Montana. Summons. Filed Jun-3, 1890. Geo. W. Sproule, clerk, by W. J. Kennedy, dep-ty clerk.

I, Rob't Kelly, United States marshal for the Territory of Montana, do hereby certify that I received the within summons on the 10th day of December, 1888, and personally served the same on the 10th day of December, 1888, upon The Northern Pacific Railroad Company, the corporation named therein as the defendant, and said Northern Pacific Railroad Company being the defendant named in said summons, by delivering a true copy of this summons to A. J. Borie, he being an officer of the said defendant, The Northern Pacific Railroad Company, to wit, superintendent of the Rocky Mountain division of the Northern Pacific railroad, at Missoula, Missoula county, Montana Territory, there being no president, secretary, treasurer, or other officer of the Northern Pacific Railroad Company or any agent of said corporation designated by said corporation as the person upon whom service of process should be made as required by law to be found in said county of Missoula.

ROBERT KELLEY,
U. S. Marshal,
By J. R. HIGGINS,
Dept. U. S. Marshal.

Dated this 10th day of December, 1888.
Fees, $2.50, paid.

16 And afterwards, to wit, on the 7th day of November, 1890, the following further proceedings were had and entered in the words and figures following, to wit:

In the United States Circuit Court, Ninth Circuit, District of Montana, Third Day, November Term, A. D. 1890.

FRIDAY, *November 7th*, 1890—10 a. m.

Court convened pursuant to adjournment.
Present: Honorable Hiram Knowles, United States district judge, district of Montana.

A. J. URLIN
vs.
NORTHERN PACIFIC R. R. Co. } No. 54.

Defendant asked leave to file amended answer. Motion granted; amended answer to be filed forthwith.

And afterwards, on said 7th day of November, 1890, defendant filed its amended answer herein; which said answer is in the words and figures following:

17 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ALFRED J. URLIN, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

Now comes the above-named defendant, by leave of the court first had and obtained, and files this its amended answer herein, and, for defense to the cause of action set forth in plaintiff's complaint—

I. Denies on its information and belief that on or about the first day of July, 1888, the plaintiff purchased of the defendant, at its station at the town of Missoula or elsewhere, a ticket which entitled him to be *be* carried as a passenger in the cars of the defendant between the town of Missoula and the station called Garrison, or elsewhere.

II. Denies on its information and belief that the said plaintiff paid to this defendant the usual or any price for said ticket.

III. Denies that on the day named in said complaint or at any other time it carelessly or negligently allowed, suffered, or permitted any portion of its track at or near a place called Gold Creek to be or remain in a defective, bad, unsafe, or dangerous condition, and denies that at the date of the accident mentioned in the
18 complaint herein the track at or near said Gold Creek was in a defective, bad, unsafe, or dangerous condition in consequence of defendant having carelessly or negligently allowed, suffered, or permitted the cross-ties used in the construction of its said railroad track at the said place to be or remain in a defective, decayed, rotten, or dangerous condition.

IV. Denies that its said cross-ties at or near said Gold Creek were in a defective, decayed, or rotton condition on or about the first day of July, 1888, or at any other time.

V. Denies that it was in consequence of defective, decayed, or rotton cross-ties that defendant's train was derailed at or near the station mentioned in plaintiff's complaint herein, and at the date in said complaint mentioned or at any other time.

VI. Denies that the agents, servants, or employees of this defendant or any or either of them handled, managed, or conducted the train of cars upon which plaintiff was riding, as mentioned in his complaint herein, in such a careless or negligent manner as that a

portion of the cars composing said train was derailed and thrown down the embankment or overturned.

VII. Denies that the servants, agents, or employees of this defendant or any or either of them were negligent or careless in or about the management of its said train at or about the time of the occurrence of the accident resulting in the injury to said plaintiff.

VIII. Denies on its information and belief that by reason of the overturning of said cars the said plaintiff was crushed,
19 bruised, mangled, or wounded, or that one of his teeth was fractured or broken, or that his ribs or any of them were fractured or broken, or that he otherwise received severe or dangerous wounds or internal injuries; and, further, on its information and belief this defendant denies that because of said accident the said plaintiff was sick, sore, or disabled, or was confined to his bed for a period of two months or for any other length of time, or that he so remained sick, sore, or wounded or disabled from the first day of July, 1888, up to the time of the commencement of this action or for any other or greater period of time than about thirty days.

IX. Defendant further denies that in consequence of injuries received by plaintiff in said accident his general health has been ruined or materially impaired, or that he is permanently disabled or rendered unable to attend to business pursuits, or that he is deprived of the comfortable enjoyment of life.

X. Denies that by reason of the injuries received by plaintiff at the time and place mentioned in his complaint or at any other time or place he has been damaged in the sum of fifty thousand dollars or any other sum or amount, or any other or greater sum or amount than about five hundred dollars.

XI. Denies that by reason of any injuries received in said accident that plaintiff has been incapacitated from attending to his business as a grocer and dealer in vegatables and provisions, or that in consequence of any such injuries he was compelled to relinquish or discontinue the same.

Wherefore defendant asks to be hence dismissed without day and have judgment for its costs.

T. C. MARSHAL AND
CULLEN, SANDERS & SHELTON,
Attorneys for Defendant.

20 STATE OF MONTANA, } ss:
County of Lewis & Clarke, }

W. E. Cullen, being first duly sworn, on oath says: The above-named defendant is a corporation, and I am an officer thereof, to wit, I am one of its division counsel in the State of Montana. I have read the foregoing amended answer and know the contents thereof, and the facts therein stated are true to the best of my knowledge, information, and belief.

W. E. CULLEN.

Subscribed and sworn to before me this seventh day of November, A. D. eighteen hundred and ninety.

GEO. W. SPROULE, *Clerk.*

(Endorsed:) No. 54. In the United States circuit court, ninth circuit, district of Montana. Alfred J. Urlin *vs.* Northern Pacific R. R. Co. Amended answer. Filed Nov. 7th, 1890. Geo. W. Sproule, clerk. Cullen, Sanders & Shelton, attorneys for defendant.

And afterwards, to wit, on the 20th day of April, 1891, the following further proceedings were had and entered of record in the words and figures following:

In the United States Circuit Court, Ninth Circuit, District of Montana, Thirteenth Day, April Term, A. D. 1891.

MONDAY, *April 20th*, 1891.

Court convened pursuant to adjournment.

Present: Honorable Hiram Knowles, United States district judge for the district of Montana.

A. J. URLIN
vs.
NORTHERN PACIFIC R. R. Co. } No. 54.

Cause ordered set for trial May 11th, 1891.

21 And afterwards, to wit, on the 6th day of May, 1891, the following further proceedings were had and entered of record in the words and figures following:

In the United States Circuit Court, Ninth Circuit, District of Montana, Twenty-sixth Day, April Term, A. D. 1891.

WEDNESDAY, *May 6th*, 1891—10 a. m.

Court convened pursuant to adjournment.

Present: Honorable Lorenzo Sawyer, U. S. circuit judge, ninth circuit; Honorable Hiram Knowles, United States district judge.

A. J. URLIN
vs.
NORTHERN PACIFIC R. R. Co. } No. 54.

On motion of attorneys for defendant, the trial of this cause is reset for May 25, 1891, at 10 a. m.

And afterwards, to wit, on the 26th day of May, 1891, the following further proceedings were had and entered of record in the words and figures following:

In the Circuit Court of the United States, Ninth Circuit, District of Montana, Forty-third Day, April Term, A. D. 1891.

TUESDAY, *May 26th*, 1891—10 a. m.

Court convened pursuant to adjournment.
Present: Honorable Hiram Knowles, U. S. dist. judge for the dist. of Montana.

ALFRED J. URLIN
vs.
NORTHERN PACIFIC RAILROAD COMPANY. } No. 54.

This cause came on regularly for trial this 26th day of May, 1891, Messrs. Woody and Webster appearing as counsel for plaintiff and Messrs. Cullen, Sanders and Shelton and C. Linkenback appearing for defendant.

Whereupon further hearing continued until May 27th,
22 1891, at 10 a. m.

And afterwards, to wit, on the 27th day of May, 1891, the following further proceedings were had and entered of record in the words and figures following:

In the United States Circuit Court, Ninth Circuit, District of Montana, Forty-fourth Day, April Term, A. D. 1891.

WEDNESDAY, *May 27th*, 1891—10 a. m.

Court convened pursuant to adjournment.
Present: Honorable Hiram Knowles, United States district judge for the district of Montana.

ALFRED J. URLIN
vs.
NORTHERN PACIFIC R. R. CO. } No. 54.

Counsel present as before, and trial of cause resumed.
Further trial of cause continued until May 28th, 1891, at 10 a. m.

And afterwards, to wit, on the 28th day of May, 1891, the following further proceedings were had and entered in the words and figures following:

In the Circuit Court of the United States, Ninth Circuit, District of Montana, Forty-fifth Day, April Term, A. D. 1891.

THURSDAY, *May 28th*, 1891—10 a. m.

Court convened pursuant to adjournment.
Present: Honorable Hiram Knowles, United States district judge for the district of Montana.

ALFRED J. URLIN
vs.
NORTHERN PACIFIC R. R. Co. } No. 54.

Counsel present as before and trial of cause resumed. Evidence being closed, counsel commenced their argument, and thereupon further hearing continued until Friday, May 29th, 1891, at 10 a. m.

23 And afterwards, to wit, on the 29th day of May, 1891, the following further proceedings were had and entered of record in the words and figures following:

In the Circuit Court of the United States, Ninth Circuit, District of Montana, Forty-sixth Day, April Term, A. D. 1891.

FRIDAY, *May 29th*, 1891—10 a. m.

Court convened pursuant to adjournment.

Present: Honorable Hiram Knowles, United States district judge for the district of Montana.

ALFRED J. URLIN
vs.
NORTHERN PACIFIC R. R. Co. } No. 54.

Counsel present as before and hearing of cause resumed, and after argument of counsel and instructions of the court the jury retire for deliberation, and subsequently render the following verdict:

24 In the United States Circuit Court, Ninth Circuit, District of Montana.

ALFRED J. URLIN, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

We, the jury empanneled and sworn to try the above-entitled action, find for the plaintiff and assess his damages at seventy-seven hundred and fifty dollars, $7,750.00.

MOSES MORRIS, *Foreman.*

(Endorsed:) No. 54. In the circuit court of the United States, ninth circuit, district of Montana. A. J. Urlin *vs.* The Northern Pacific R. R. Co. Verdict. Filed May 29th, 1891. Geo. W. Sproule, clerk.

And at said time and on said 29th day of May, A. D. 1891, the following finding of facts *are* presented by said jury and filed as follows:

25 In the Circuit Court of the United States for the Ninth Circuit, District of Montana.

ALFRED J. URLIN, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

I. Was the derailment of defendant's train at the time plaintiff was injured caused by rotten ties?

Answer. Yes.

II. Were the cross-ties at the point where defendant's train left the track on the occasion complained of by plaintiff so decayed or rotten as to be unsafe for the passage of trains thereover?

Answer. Yes.

III. Were the cross-ties at the p-int where defendant's train was derailed so decayed or rotten that their condition could be observed by defendant's agents and employees, whose duty it was to care for and keep the track in repair at said point, by the exercise of the utmost care characteristic of a very careful and prudent man?

Answer. Yes.

IV. Was defendant exercising the utmost care characteristic of a very careful and prudent man in keeping its track in repair at the time and place where the derailment complained of in this action occurred?

Answer. No.

V. What was the cause of the derailment of defendant's train at the time plaintiff received the injuries complained of?

Answer. Rotten ties.

(Endorsed:) No. 54. In the circuit court of the United
26 States, ninth circuit. A. J. Urlin *vs.* The Northern Pacific R. R. Co. Findings of fact. Filed May 29th, 1891. Geo. W. Sproule, clerk.

And at said time and date, May 29th, 1891, the following further proceedings were had and entered of record in the words and figures following:

Thereupon, at the request of counsel for defendant, said jury was polled by the clerk, and each of said jurors answered that the verdict as read was theirs.

Plaintiff thereupon moved for judgment herein in accordance with the said verdict. Motion granted and judgment ordered entered herein accordingly.

And afterwards, on said 29th day of May, 1891, the following judgment was entered herein in the words and figures following:

27 In the United States Circuit Court, Ninth Circuit, District of Montana.

ALFRED J. URLIN, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

This cause having come on regularly for trial upon the 26th day of May, 1891, being a day in the April, 1891, term of said court, before the court and a jury of twelve men, duly empaneled by the clerk of said court, Woody & Webster appearing in behalf of the plaintiff, and Messrs. Cullen, Sanders & Shelton and C. Linkenbach appearing in behalf of the defendant, and the trial having been proceeded with on the 26th, 27th, 28th, and 29th days of May, 1891, in said term and year, and the evidence, oral and documentary, on behalf of the respective parties having been introduced and closed, and the cause, after argument of counsel and the instructions of the court, having been submitted to the jury, and the jury having subsequently and on the 29th day of May, 1891, rendered the following verdict:

"In the United States Circuit Court, Ninth Circuit, District of Montana.

ALFRED URLIN, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

We, the jury, empaneled and sworn to try the above-entitled action, find for the plaintiff and assess his damages at seventy-
28 seven hundred and fifty dollars, $7,750.00.

MOSES MORRIS, *Foreman.*"

and having also at the same time returned into court the following special findings, to wit:

"I. Was the derailment of the defendant's train at the time plaintiff was injured caused by rotten ties?

Answer. Yes.

2. Were the cross-ties at the point where defendant's train left the track on the occasion complained of by plaintiff so decayed or rotten as to be unsafe for the passage of trains thereover?

Answer. Yes.

3. Were the cross-ties at the point where defendant's train was derailed so decayed or rotten that their condition could be observed by defendant's agents and employés, whose duty it was to care for and keep the track in repair at said point, by the exercise of the utmost care characteristic of a very careful and prudent man?

Answer. Yes.

IV. Was defendant exercising the utmost care characteristic of a very careful and prudent man in keeping its track in repair at the

time and place where the derailment complained of in this action occurred?

Answer. No.

V. What was the cause of the derailment of defendant's train at the time plaintiff received the injuries complained of?

Answer. Rotten ties."

On motion of Woody & Webster, counsel for plaintiff, it was then and there ordered by the court, in the presence of the counsel for the defendant, that judgment be entered on said verdict in favor of the plaintiff and against the defendant for the said sum of seventy-seven hundred and fifty dollars and costs of suit.

29 Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that said plaintiff have and recover from said defendant the sum of seven thousand seven hundred and fifty dollars, with interest thereon at the rate of ten per cent. per annum from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of two hundred and twenty-eight $\frac{90}{100}$ ($228.90) dollars.

Judgment rendered May 29th, 1891.

And thereafter, on, to wit, the 4th day of June, 1891, the following further proceedings were had and entered of record as follows:

In the Circuit Court of the United States, Ninth Circuit, District of Montana, Forty-ninth Day, April Term, A. D. 1891.

THURSDAY, *June 4th*, 1891—10 a. m.

Court convened pursuant to adjournment.

Present: Honorable Hiram Knowles, United States district judge for the district of Montana.

ALFRED J. URLIN
vs.
THE NORTHERN PACIFIC R. R. Co. } No. 54.

Counsel for defendant appeared in court and asked that time for filing bill of exceptions herein be extended 10 days; whereupon it is ordered that defendant have until June 15th, 1891, to file its bill of exceptions.

And afterwards, on the 10th day of June, 1891, defendant filed its bill of exceptions in the words and figures following, viz:

30 In the Circuit Court of the United States for the Ninth Circuit, District of Montana.

ALFRED J. URLIN, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Defendant's Bill of Exceptions.

Be it remembered that heretofore, to wit, on or about the — day of April, A. D. 1891, the said plaintiff filed his interrogatories for the purpose of taking the deposition of Calvin De Witt, a witness on his behalf, and, among other things, propounded to the said witness the following question, to wit:

"Interrogatory No. 13. Were the examinations of the plaintiff made by you in connection with other physicians made in a superficial or in a careful or other manner?"

To which said interrogatory defendant, on the 18th day of April, 1891, filed an exception for the reason that the question so propounded to said witness was incompetent, in that it called for the opinion of the witness as to a fact which should be found by the jury from the testimony showing what was done at each of the examinations inquired about, and in that it called for the opinion of the witness upon a question upon which he had not been called upon to testify as an expert, and the same was not an expert opinion.

That thereafter and on the 24th day of April, 1891, the
31 court overruled said objection and permitted said interrogatory to be propounded to the witness.

To which said ruling of the court the defendant then and there duly excepted.

And thereafter the deposition of Dr. W. P. Mills having been taken before W. P. Baker, a notary public, at the city of Missoula, county of Missoula, State of Montana, on the 12th day of May, A. D. 1891, and it appeared therefrom that the said witness before testifying was duly sworn, but not that he was cautioned and duly sworn to testify the whole truth of his knowledge in said cause, the defendant, on the 25th day of May, A. D. 1891, and before the empaneling of the jury in said cause, filed a motion therein and moved the court to suppress the deposition of said Mills for that it did not appear in and by said deposition or by the certificates of the officer thereto that said witness was cautioned and sworn by the notary before whom said deposition was taken to testify the whole truth relative to the issues raised by the pleadings therein; but the court then and there overruled said motion and permitted the said deposition to be read in evidence on the trial of said cause.

To which said ruling of the court defendant then and there duly excepted.

And on the date aforesaid, before the empanneling of the jury in said cause, the defendant, moved the court in writing to suppress and not suffer to be read to the jury on the trial of said cause the

following language, found in lines one and two of page three of said deposition, namely: "Patient complained of pain on pressure, all over depression, but was marked in region just mentioned," for the reason that the same was a declaration of plaintiff made in his own behalf and no part of the *res gesta* and is inadmissable, in that it appeared that said examination was made on the 25th day of
32 November, 1888, and the complaint in this action was filed on the 28th day of the same month; but the court overruled said objection and suffered and allowed such portion of said deposition to be read to the jury.

To which ruling of the court defendant then and there duly excepted.

Defendant likewise objected to the following language found in said deposition, to wit: "Complained of pain on pressure on left side of abdomen from border of ribs of chest of ilium; inability to lay on left side, and when on right side progging pain on left, as if bowels were hanging; his indigestion constant; eructation of wind (gas from stomach), and states he passes per rectum a quantity in the morning; complains of constipation, accompanied by pain, unless relieved by fruit or medicine; states he sleeps little," for the same reasons as given in the last foregoing exception; but the court overruled said objection and permitted said portion of said deposition to be read to the jury in said cause.

To which said ruling of the court the defendant then and there duly excepted.

Defendant also excepted to the following language contained in said deposition, to wit: "But he had tried to take solid food several times, which caused distress in stomach and bowels," for the season that the testimony so sought to be given was evidently hearsay, and was incompetent for the reasons above given; but the court overruled said objection and allowed said portion of said deposition to be read to the jury on the trial of said cause.

To which said ruling of the court the defendant then and there duly excepted.

Defendant also, at the time and place aforesaid, moved to strike out and suppress the following portion of said deposition,
33 to wit: "At this time Mr. Urlin furnished some expectoration for examination by Dr. Hencke under the microscope, which showed pus, blood, and mucus," for the reason that said testimony was evidently hearsay, it not appearing that the witness examined the said expectoration with Dr. Hencke, but that said examination was made by Dr. Hencke alone; but the court overruled said objection and permitted the same to be read to the jury on the trial of said cause.

To which said ruling of the court the defendant then and there duly excepted.

Defendant also objected to the following portion of said deposition, found on page 5 thereof, to wit: "And sleep very much broken. At all times he suffered much more pain in bowels, stomach, and lungs since taking cold," for the reason that said testimony was evidently hearsay and was incompetent for the reasons above

stated; but the court overruled said objection and allowed said testimony to be read to the jury.

To which said ruling of the court the defendant then and there duly excepted.

Defendant also objected to the following portion of said deposition, found on page 6 of said deposition, to wit: "He complains of pain on pressure and when lying down;" and also to the following, found on page 7: "And when lying down he has pain, except when he assumes a certain position, in region of stomach and colon, left side angle cardiac end of stomach and left end of transverse and angle, and portion of the descending colon; and also complains of constipation and accumulation of gas in that portion of the bowels; says he must live on fruit," for the reason that all of such testimony were and are declarations made to the witness by plaintiff after the commencement of this suit, and are neither the result of observation of facts by said witness or of any medical opinion proper
34 to be given by him; but the court overruled such objection and allowed and permitted such deposition and the language above quoted to be read to the jury on the trial of said cause.

To which said ruling of the court and the admission of such testimony the defendant then and there duly excepted.

Defendant also objected to the third question and answer, found on page 7 of said deposition; which said question and answer were as follows, to wit:

"Q. Were the examinations made by you and the other physicians made in a superficial or in a careful and thorough manner?

"A. No, sir; the examinations were made with as much care and thoroughness as it was possible."

for the reason that the said question and answer were incompetent and a matter about which the witness was not qualified to express an opinion, it being an opinion about a matter not connected with the business of the physician as an expert; but the court overruled such objection and permitted the same to be read to the jury on the trial of said cause.

To which said ruling of the court the defendant then and there duly excepted.

And upon the examination of said witness the defendant having asked said witness where he had practised medicine, and the witness having replied at Sweet Springs, Missouri, from 1879 until the fall of 1882; and upon — examination the witness having testified that he practised both medicine and surgery; that he had known plaintiff eight years, at Missoula; that he never was a robust man, but was not sick to his knowledge; that he had never doctored Mr. Urlin until November, 1888; that he had never seen him perform manual labor; that he examined him in his office in Missoula; that in his opinion the coughing and constipation of plaintiff was due to the injury he had received; that Mr. Urlin's general condi-
35 tion was improving and had improved after witness'es first examination of him; that his condition was better in June, 1890, when he last examined him, than it had been in the previous

December; that there was no expansion of the lower lobe of the left lung at the time he first examined him; that the area of dulness had grown less apparently since his first examination; that the plaintiff looked better than he did when he first came to witness, in November, 1888; that in his opinion he was not physically so well as he was previous to the receipt of his injuries.

The plaintiff, on redirect examination, asked the witness the following question:

"Q. Were you, some three or four years since, employed by the Northern Pacific Railroad Company as a physician and surgeon on the Rocky Mountain division of that road; and, if so, what were your duties as such?

"Ans. Yes, sir; I was employed for two years, 1886 and 1887, as assistant surgeon on the Rocky Mountain division. My duties were to assist the chief surgeon in all accidents that might happen—all emergencies that might arise; in fact, render him any assistance he might need."

To which said question and answer the defendant then and there duly objected, and moved to strike the same out and not permit it to be read to the jury for that it was not redirect examination as to any new matter brought out on cross-examination, and for the further reason that the same was irrelevant and immaterial; but the court overruled such objection and allowed the same to be read to the jury upon the trial of the said cause.

To which said ruling of the court the defendant then and there duly excepted.

Defendant also objected to the following question and answer asked the witness on his redirect examination, to wit:

Q. During the time that you were so employed were you
36 at any time, in the absence of the chief surgeon of the Rocky Mountain division, placed in charge of the railroad hospital at Missoula; and, if so, what length of time were you in that position?

A. Yes; when Dr. Horton was taken sick he employed me to take charge of the hospital, and I remained in charge about two months, as near as I can remember, during his absence in Florida."

To which said question and answer counsel for the defendant duly objected and moved to strike out the same and not suffer it to be read to the jury, for the reasons given in the last objection to the above question; but the court overruled such objection and permitted the same to be read to the jury on the trial of said cause.

To which said ruling of the court defendant then and there duly excepted.

Also the following question and answer on redirect examination:

Q. State whether or not, from your observation and treatment of Mr. Urlin, if his condition is not really better during warm than during fall and winter months;" to which question the witness answered "Yes, sir;" and to which question and answer the defendant objected *to* and moved to suppress the same for the reason that it was leading, incompetent, irrelevant, and immaterial; but

the court overruled such objection and permitted said question and answer to be read to the jury upon the trial of said cause.

To which said ruling of the court counsel for defendant then and there duly excepted.

37 Defendant likewise, at the time and place aforesaid, objected to all those portions of the deposition of Dr. De Witt hereinafter more particularly specified:

So much of the answer to the seventh interrogatory as is as follows, to wit: "Although the patient complained of pain all over this depression," for the reason that such declaration of plaintiff was made to said witness at the time of his examination on the 25th day of November, 1888, three days prior to the bringing of this suit, and was hearsay, unwarranted, and immaterial. Also the following language found in answer to interrogatory 7: "The patient complained of pain on left side of abdomen, from the lower border of the ribs to the crest of the ilium; also of inability to lay on left side and, when on right side, dragging pains on the left side as if his bowels were hanging from it; severe indigestion and constant constipation unless relieved by fruit or medicine, and that he slept badly," for the reasons already given; but the court overruled such objections and permitted the same to be read to the jury on the trial of said cause.

To which said ruling of the court the defendant then and there duly excepted.

And thereafter and on the 26th day of May, 1891, that being one of the days of the trial term of said court, on the trial of said cause to a jury, the plaintiff, to maintain the issues on his part, was sworn as a witness on his own behalf, and having testified that on or about the first day of July, 1888, he purchased a railroad ticket in the town of Missoula over the line of defendant's road, from that point to Garrison, Montana, the ticket so purchased being introduced in evidence, and thereupon entered the cars of defendant as a passenger; that while riding in the first-class coach of defendant's train the said first-class coach, together with the diner and sleeper, were

38 derailed at or near a station called Gold Creek, and the car in which plaintiff was riding was overturned; that plaintiff was rendered senseless and regained consciousness only when outside the car; that after regaining consciousness he walked down the road-bed and looked at the cross-ties, which were rotten; that he tried to stoop down to pick up a piece of one of them and found that he could not and that he was injured; that he turned around and walked to the smoking car, was helped in and was taken thence to Garrison, ice being placed on his body while on the way, and on the next day was taken back to Missoula, where he was placed in the hospital of the Northern Pacific Beneficial Association; that he remained in said hospital undergoing treatment for said injuries from said time to about the fifteenth day of August, 1888; that he had three ribs broken on the left side, one of which ran into his left lung, causing a wound therein; that during a portion of said time blood was flowing from the wound in his said left lung; he was

bruised about the head and face; had one tooth broken; also that he had received injuries to his bowels; that during the time that he was in the Northern Pacific hospital he was constipated and could not have a passage except by the use of injections and underwent great agony, had hard work to breath-, and was apprehensive of death; that on or about the 25th day of November, 1888, he underwent an examination made by Drs. Mills, Henke, and De Witt. Thereupon his counsel asked him the following question:

"Q. What was your condition at that time?" To which the witness answered:

"A. A gathering of water inwardly."

To which answer counsel for defendant objected for the reason that it appeared to be based upon the opinion of the witness or was hearsay derived from the report made by the physicians who examined; but the court overruled such objection and per-
39 mitted such testimony to go to the jury.

To which ruling of the court defendant then and there duly excepted.

Witness further testified that on December 11th he was again examined by Drs. De Witt and Mills, was subsequently examined in January following and on the 23rd day of November, 1890, for the purpose of finding out from what injuries he was suffering; that from the date of said accident he had been incapacitated from following any business. Whereupon counsel for plaintiff asked the witness the following question:

"Q. What, if anything, has been the effect of these injuries upon you since receiving them with reference to attending to any business?"

To which said question counsel for defendant objected for that it was calling for an opinion from the witness; but the court overruled such objection and permitted the witness to answer such question.

To which said ruling of the court defendant then and there duly excepted.

Witness having further testified that he was in the grocery business at the time he sustained the injuries, and that prior to that time he had been in the lumber business, being proprietor of a planing mill, counsel for plaintiff asked the witness the following question:

"Q. During what year or years were you in the lumber-mill business—the planing-mill business?"

To which question defendant's counsel objected for the reason that the same was immaterial; but the court overruled such objection and permitted the witness to answer the question.

To which ruling of the court counsel for defendant then
40 and there duly excepted.

Whereupon witness testified that about three years before the accident he had been in the planing-mill business; that he kept the books, measured lumber, handled lumber sometimes, and was generally in the mill looking around; that since the first day of July, 1888, he had done nothing.

Whereupon counsel for plaintiff asked the witness the following question:

"Q. For what reason have you done nothing?"

To which question counsel for defendant objected for the reason that the testimony sought was incompetent and immaterial; but the court overruled the objection and permitted the witness to answer said question.

To which ruling of the court defendant then and there duly excepted.

Counsel for plaintiff also asked the witness:

"Q. What is your condition physically now and since you received these injuries as compared with your physical condition at and immediately prior thereto?"

To which question counsel for defendant then and there duly objected for the reason that the testimony sought called for an opinion merely and not the statement of any facts within the knowledge of the witness; but the court overruled such objection and permitted the witness to answer said question.

To which said ruling of the court defendant then and there duly excepted.

Witness testified that he was not able to sit down or ride for any length of time or stand the wear and *tare* or excitement of very much business; that it affected his heart; that he was not able to ride on horseback at all. Witness also testified that he was
41 forty-eight years old, having been born in the Dominion of Canada in the year 1842.

And on cross-examination counsel for defendant asked the witness, with reference to the grocery business which he had testified he had been carrying on just prior to the date of the accident, the following question:

"Q. How much stock did you carry on an average about in that business?" To which said question counsel for plaintiff objected for the reason that it was not cross-examination and that plaintiff had not been permitted to go into the details of such grocery business on the examination-in-chief; which objection was sustained by the court, and witness was not required to answer said question.

To which said ruling of the court the defendant then and there duly excepted.

Plaintiff also called and had sworn one PATRICK TONER, who testified that he lived in the immediate vicinity of Gold Creek at the date of the accident; that his business was ranching; that he remembered the wreck which took place near Gold Creek on or about the first day of July, 1888; that he was at the scene of the wreck about half past nine the next morning and examined the condition of the railroad track where the accident happened and the condition of the ties; that the railroad iron was about six or seven feet apart—spre-d out—for a distance of about three or four car-lengths; that a majority of the cross-ties were rotten; that he walked over a good many of them, but that there were men there at work replacing

said track; that he had walked over the ties the evening before the accident happened.

Whereupon counsel for plaintiff asked the witness the following question:

42 "Q. State whether or not a person passing over them could see w-ether the ties were rotten or not?"

To which said question counsel for defendant objected for the reason that it was calling for an opinion from the witness and did not require that the witness should describe what could be seen with reference to said ties; but the court overruled such objection and permitted the witness to answer the said question.

To which ruling of the court defendant then and there duly excepted.

And upon redirect examination counsel for plaintiff asked the witness the following question:

"Q. Do you know whether or not these ties were sound enough to hold spikes if there was any pressure or anything of that kind brought against the spikes?" To which said question counsel for defendant then and there objected, for that it was calling for an opinion from the witness, the witness not being sworn as an expert and the question being one primarily for the determination of the jury; but the court overruled such objection and permitted the witness to answer the said question.

To which said ruling of the court counsel for defendant then and there duly excepted.

The plaintiff also introduced and had sworn one GEORGE ANTHONY, who testified substantially as follows:

That at the date of the accident he was mining in Pioneer, but had a ranch near the scene of the accident; that he remembered the date of the accident and was at the scene of it on the fourth day of July; that at the time he was there there were some new ties and some old ties in the track at the point where the accident occurred; that he had traveled over the track in that vicinity three or four times that summer going to his mines and had no-

43 ticed the condition of the ties at the place where the accident occurred. Whereupon counsel for the plaintiff asked the witness the following question:

"Q. What was the condition of the ties then?" To which said question counsel for the defendant then and there objected for the reason that it appeared from the testimony of the witness that the time he passed over the track was too remote to allow his testimony to be admitted, and that it was irrelevant and immaterial; but the court overruled such objection and permitted the witness to answer the said question.

To which ruling of the court the defendant then and there duly excepted.

And the witness answered that the condition of a good many of them was very bad; that they were rotten, so rotten as to be visible to the naked eye, and so rotten that he could kick them to

pieces; that such rotten ties were in about a mile of the road that he traveled over, but that he could not say that there were any such rotten ties in the road at the point where the accident occurred; that there were many rotten ties there, but not so rotten as he had seen above and below the switch.

Defendant here moved to strike out the testimony of the witness as related to rotten ties seen at other points than at the point where the accident occurred; but the court overruled such motion and permitted such testimony to go — the jury.

To which said ruling of the court defendant then and there duly excepted.

Plaintiff introduced also and had sworn Dr. J. B. ATCHISON, who testified that he was a physician and surgeon, and that on or about the 26th day of May, in connection with Drs. Steele, Bullard, and Treacy, he had made a surgical examination of the plaintiff;
44 that he found that there had been a fracture of the seventh and eighth ribs, which had united; that the tenth and eleventh ribs had also been separated from the costal cartilage and that they had not reunited with it; that the patient upon pressing the abdominal region suffered pain; that there was no perceptible enlargement and nothing that was abnormal in that position except the pain; that there was also a fracture of the outer end of the clavic*al* of the left shoulder; that there was irr*a*tation of the spine and a difference in the measurement of the thorax, the right side being three-fourths of an inch larger; there also seemed to be a difference in the respiratory expansion of the left side and the heart's action was weak; that these injuries were deleterious to health and calculated to constitute a condition of invalidism which would continue an indefinite time and probably be permanent.

Whereupon counsel for plaintiff asked the witness the following question:

"Q. I will ask you to state fully in reference to the injuries which you say you found with reference to his spine and what effect, if any, that of itself would have upon his mental organism."

To which said question counsel for defendant objected for the reason that injury to the spine is not mentioned in the complaint of plaintiff as an injury for which he claimed the right to recover damages; that it was not shown that said injury resulted from the accident or that an injury to the spine would necessarily or probably affect plaintiff's mental organism.

But the court overruled such objection and permitted the witness to answer the question.

To which ruling of the court counsel for defendant then and there duly excepted.

45 The witness then testified that it would tend to weaken the lower portions of plaintiff's body; that it might by a sympathetic relation to the general system affect the entire system; that it might not of itself affect the mind, but by its relation to the other conditions it might affect the brain and other organs. Witness further testified that plaintiff was a weak man naturally and

that these injuries or this condition of the spine, which he did not know was an injury resulting from the accident or a functional trouble, would tend to prevent the plaintiff from following any business or occupation requiring much physical or mental labor; that possibly he might perform light work, such as keeping a set of books, if they did not require much work, and for a few hours each day.

Plaintiff also called and had sworn in his behalf one C. W. LOMBARD, who testified that he had been acquainted with plaintiff since 1876; that from the commencement of his acquaintance up to the date of his accident plaintiff had always been in good health as far as he knew; that he had been a book-keeper in Worden's store and afterwards was in a planing mill; that he was with plaintiff in California some time in March, 1890, stopping with him at the same hotel in Los Angeles; that the plaintiff was suffering considerably, and for more than a week was unable to leave the hotel and go down-town; that after plaintiff recovered somewhat from this illness he went with the witness to Riverside, and witness and plaintiff stopped at the same hotel and slept in the same room; that witness had been kept awake all that night by plaintiff's coughing and belching wind.

Whereupon counsel for plaintiff asked the witness the following question:

"Q. I will ask you to state if at that time he stated wherein his pain was or in what manner he was distressed."

46 To which said question counsel for defendant objected for *for* that it did not appear by the testimony that witness was a physician and treating plaintiff professionally, or that witness occupied any other relation toward plaintiff which would make such statement competent evidence in this case; but the court overruled said objection and permitted the witness to answer the said question.

To which said ruling of the court counsel for defendant then and there duly excepted.

Witness testified that Mr. Urlin frequently told him about his sufferings and where he suffered pain; that it was in his side principally; that he was obliged to eat fruit to keep from being constipated; that he suffered continually, and frequently talked to witness about it.

The plaintiff also called as a witness in his behalf one Dr. L. H. CHOQUETTE, who, being first duly sworn, testified as follows:

That he was a physician practising in Missoula, Montana; that he had known plaintiff since 1878 or 1879, and had been his family physician since that date; that he had only been called to see Mr. Urlin once, and it was then for the purpose of prescribing for a pain in his back, which was nothing but lumbago or rheumatic trouble, and this is the only time he had been consulted by Mr. Urlin for himself. Mr. Urlin always looked like a healthy man; not very robust or strong, but healthy; that since Mr. Urlin's in-

juries he had walked with a cane, which witness had never seen him using before his injuries; that he walked stooped and very slow, and complained once and awhile of pain; that he had never seen him working in his garden since the accident.

Whereupon counsel for plaintiff asked the witness the
47 following question:

"Q. I will ask you whether or not you have seen him do any work or labor or engaged in any business since the accident."

To which question counsel for defendant objected on the ground that it was immaterial and irrelevant, the question being of the ability of the plaintiff to perform labor; but the court overruled such objection and permitted the witness to answer the question.

To which said ruling of the court defendant then and there duly excepted.

The witness answered, "No, sir; I never saw Mr. Urlin engaged in any kind of business after the accident."

After the defendant rested the plaintiff was recalled as a witness in his own behalf, and was asked by his counsel the following question:

"Q. State whether or not since your accident and the receipt of your injuries you have attempted to do work or perform labor or transact business."

To which question counsel for defendant objected for the reason that it was not rebuttal of any new matter brought out by defendant, and if it was competent at all it was not a part of plaintiff's case-in-chief; but the court overruled such objection and permitted the witness to answer such question.

To which said ruling of the court the defendant then and there duly excepted.

The witness answered that he had tried to do garden-work, and that whenever he did any work he was used up for two or three days; that he tried to sell town lots and do a little business in that way; that he had sold a hundred lots to one party and ten to another, but that he had not engaged in anything else.

The testimony being closed, counsel for defendant presented to the court a request in writing to charge the jury, among
48 other things, as follows: "The court instructs the jury that even if you should believe from the evidence that there were rotten ties in the road or track at other points than at the particular point where the train left the track, this is not sufficient to find that the defendant was negligent in this case."

But the court would not and did not so instruct the jury; to which refusal of the court the defendant then and there and before the going out of the jury duly excepted, for that the instruction upon the proposition thus submitted was material in the case, and there was nothing in the charge of the court covering such proposition.

The court thereupon charged the jury as follows:

GENTLEMEN OF THE JURY: The issues for your consideration are presented in the pleadings which you will take with you to your room.

There is no dispute but that defendant was and is a corporation and was the owner of a certain railroad known as the Northern Pacific railroad, together with the track, rolling stock, and other appurtenances belonging to the same, and was running and operating said railroad and was a common carrier of passengers for hire thereupon between the town of Missoula, on the line of said railroad, and a station thereon called Garrison.

While defendant denies that on the 1st day of July, 1888, plaintiff purchased of defendant at Missoula a ticket which entitled him to be carried as a passenger in the cars of defendant on and over the line of defendant's railroad between said town of Missoula and Garrison, for which he paid the usual price, I do not think there is much dispute upon this point.

49 While the denial of defendant required of plaintiff to prove that he did purchase such a ticket, the plaintiff has testified positively to the purchase of such a ticket, and a ticket purporting to be the same has been introduced in evidence, and plaintiff has testified that this is the ticket he purchased.

This evidence of plaintiff is not controverted by any witness in the case, and while you must find from the evidence that he did purchase such a ticket, paying therefor the usual fare, I do not think you should have much trouble in finding in favor of plaintiff upon this issue.

There is no dispute but that plaintiff was a passenger in one of defendant's cars in one of its trains going from Missoula to Garrison on the 1st day of July, 1888.

Plaintiff charges that the defendant carelessly and negligently allowed and permitted a portion of the track of its railroad at or near a point called Gold Creek, on the line of its road from Missoula to Garrison, to be and remain in a defective, bad, and unsafe and dangerous condition, in this, that it allowed and permitted the cross-ties used in the construction of its railroad track at the said point called Gold Creek to become decayed and rotten, and that they were in that condition on the said 1st day of July, 1888.

That in consequence of these rotten and decayed ties on said day a portion of said train of cars upon which plaintiff was a passenger, embracing the car in which plaintiff was riding, were derailed and turned over and plaintiff injured.

Defendant denies these allegations; and here is the first material issue in this case presented for your consideration, upon which there has been much conflict in the evidence.

In considering this issue you are called upon to determine from the evidence, 1st, as to whether or not the cross-ties of de-
50 fendant's track at the point where the derailment occurred, or any number of them, were decayed and rotten.

If you find that they were, then, 2nd, you are called upon to determine whether or not the derailing of said cars constituting a portion of said train occurred on account of these rotten ties. If you

should find that said derailment did occur on account of said rotten and decayed ties, 3rd, then you are called upon to determine whether or not defendant carelessly or negligently allowed or permitted said cross-ties to remain in and constitute a portion of its track at said point.

You will observe that you are to determine whether or not defendant carelessly or negligently allowed said cross-ties to remain in and constitute a portion of its track at said point, for if it did not carelessly or negligently permit this it is not liable, although the accident should have occurred on account of this.

This presents to your consideration what degree of care defendant should observe in keeping its track in a good and safe condition.

As a carrier of passengers the defendant was not only required to exercise care in the construction of its railroad track, but in keeping the same in a safe condition, and the degree of care it was required to exercise in these particulars was the utmost care characteristic of a very careful and prudent man acquainted with and called upon to act in such matters. If the defendant did not exercise the utmost care characteristic of a very careful and prudent man called upon to act in keeping a railroad track such as defendant's, at the place where the derailment occurred, in safe condition and in ascertaining if the cross-ties in the same were decayed and rotten, so as to make the track dangerous, and if so found to remove them, defendant was guilty of carelessness, and if the defendant could have avoided or guarded against the derailment of said cars by
51 the exercise upon its part of extraordinary vigilance, aided by the highest skill in keeping its railroad track at the place of derailment free from rotten or decayed ties, and did not do it, it was guilty of negligence. You will observe from this statement of the case the defendant was required to exercise in regard to keeping its track in a safe condition that it was of a very high degree.

If defendant did exercise this care, such as would have been characteristic of a very careful and prudent man called upon to act in the matter of keeping its track in a safe condition, then defendant is not liable, although the accident was occasioned by rotten and defective ties.

In considering what would have appeared to a very careful and prudent man called upon to consider the road where the derailment occurred you should not view the road as it appeared after the derailment, when, undoubtedly, many rotten cross-ties were exposed, but how the road would have appeared to such a man before the accident. If before the accident it would have appeared to such a man exercising the utmost care characteristic of him and having a knowledge of such matters that the road was safe, then it cannot be said that defendant was guilty of any want of care.

And if these defects in the road could not have been guarded against upon the part of the defendant by the exercise of extraordinary vigilance, aided by the highest skill, then defendant was guilty of no negligence.

The want of care on the part of any of the agents or employees

of defendant intrusted with the duty of keeping defendant's railroad track in a safe condition was the negligence of the defendant, and the care exercised by any such agents or employees was the care of the defendant.

52 The defendant was not an insurer of plaintiff against injury and is liable to the plaintiff only if it failed to exercise the high degree of care in regard to keeping its road-bed or track in a proper condition in the respect stated above.

As the plaintiff has based his right to recover upon the charge that defendant carelessly and negligently allowed the cross-ties in its road to become decayed and rotten, and that the derailment of defendant's cars arose from this fact, at the request of the defendant, I instruct you that if you should find that the accident occurred on account of a broken fish-plate you should find for defendant, or should you find that the accident occurred from some other cause than the decayed and rotten ties in defendant's railroad track you should find for the defendant.

If the jury, after considering all the evidence, find by a preponderance thereof that the derailment of defendant's cars in this case was occasioned by decayed and rotten ties in defendant's track, and that defendant by the exercise of the utmost care, characteristic of a very careful and prudent man conducting the business of examining ties, could have ascertained the fact that they were rotten and decayed before the accident occurred and would have removed them and would not have considered the road safe until they were removed, you should find for plaintiff.

But if you do not find all these facts by a preponderance of evidence you should find for the defendant.

If you find for plaintiff, then you will be called upon to assess the damages he has sustained on account of any injuries you may find that he has sustained.

At the request of the plaintiff, upon this point I give you the following instructions: The jury are further instructed that in

53 determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to and they should take into consideration all the facts and circumstances in evidence before them; the nature and the extent of the plaintiff's physical injuries, if any, testified about by the witnesses in this case, and his suffering in body and mind, if any, resulting directly from such injury, and also such prospective suffering and loss of health, if any, as the jury may believe from all the evidence before them in the case he has sustained or will sustain by reason of such injury. The suffering of mind must be such as results from bodily pain.

The jury are further instructed that if they find for the plaintiff that then in estimating the plaintiff's damages it will be proper for the jury to consider the effect of the injury in future upon the plaintiff's health, if they believe from the evidence that his future health will be affected by the injuries in question, and his inability to attend to his affairs generally in pursuing his ordinary business or calling if the evidence shows that he will be affected in the future,

and also the bodily pain and mental suffering and loss of time that he has or will suffer or sustain in future, so far as these are shown by the evidence, and all damages, present or future, which from the evidence can be treated as the necessary result of the injury complained of.

At the request of the defendant, upon this point I give you the following instructions: The court instructs the jury that if you should find from the evidence that the accident by which plaintiff suffered the injuries complained of by him resulted from the negligence of defendant and from the decayed, defective, and rotten condition of the cross-ties in defendant's railroad at or near the point where the train was derailed, then you will find for the plain-
54 tiff, and you will assess his damages at such reasonable sum as will compensate him for the injuries and suffering thus sustained and no more.

There is neither malice or wilfulness claimed or shown in this case, and therefore you must not assess any damages beyond those which are sufficient to compensate plaintiff—that is to say, that vindictive or exemplary damages cannot be allowed in this case. The fact that the defendant is a railroad corporation does not alter the rule in this respect, and your verdict for damages, if any, should be precisely the same that it would be if the action were against a natural person.

The court further instructs the jury that to entitle the plaintiff to recover present damages for apprehended future consequences there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury complained of, and a mere possible continuance of disability by reason of an injury is not a proper element of damage. To justify you, gentlemen of the jury, in assessing damages for a future or permanent disability it must appear by the proofs that continued or permanent disability is reasonably certain to result from the injury complained of.

In estimating the amount of damages to be awarded to plaintiff for permanent injury, if you should find that he sustained any, the elements to be considered are the former occupation of the plaintiff, the amount of money he received from it, and the extent which the act of the defendant has impaired his capacity to perform the duties of that or any other calling for which he is fitted. These, and these only, are the elements which you should consider in determining what sum you will award him for this cause.

The jury are the exclusive judges of the credibility of the
55 witnesses who have testified before you and what weight should be given to the evidence of each.

And at the request of the defendant I give you the following instructions bearing upon this point:

There is in this case considerable expert testimony, viz., that of physicians and surgeons who have been permitted to testify concerning the nature and character of the injuries received by plaintiff and the probability of their being of a permanent or temporary character. Expert testimony consists of the opinions of persons

skilled in some science, art, or trade, about matters relevant to the issues under investigation. The weight to be given to such testimony by the jury depends largely upon the character, knowledge, and experience which the witness has had in the profession, art, or trade about which he is testifying. If you should find from the testimony that one of these medical experts was mistaken about or ignorant of physiological facts, which, from the nature of things, should have been known to him, then this is a fact which should be taken into your consideration in determining the weight to be given to the testimony of such witness. From what I have already said on this subject you will readily understand that the opinions of medical experts are not conclusive upon you, but are to be weighed by the jury like all other evidence.

The court instructs the jury that the credibility of the witness, as I have before said, is a question exclusively for the jury; and the law is, that when a number of witnesses testify directly opposite to each other the jury are not bound to regard the weight of the evidence as evenly balanced. The jury have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent intelligence or lack of intelligence, their manner of acquiring knowledge of a particular fact, and
56 from all other surrounding circumstances appearing on the trial, which witnesses are most worthy of credit, and to give credit accordingly. You are the sole judges of the credibility of the witnesses and the weight to be attached to the testimony of each and all of them, and you are not bound to take the testimony of any witness as absolutely true, but may take into consideration their manner of testifying and their means of acquiring knowledge of any fact upon which they may testify, and you should do so. If you are satisfied from all the facts and circumstances proved on the trial that witnesses are mistaken in the matter testified to by them or that for any other reason their testimony is unreliable, then such testimony must be weighed accordingly.

I will add to this. The jury should also take into consideration, if the same appears from the evidence, the motives which might induce any witness to give a bias in his evidence for or against either party and which might induce him to testify falsely.

* * * * * * *

Wherefore defendant prays that this its bill of exceptions may be signed, sealed, and made a part of the record, which is done accordingly this 19th day of June, A. D. 1891.

HIRAM KNOWLES, *Judge.*

STATE OF MONTANA, }
County of Lewis and Clarke, } *ss:*

C. Linkenback, being duly sworn, says that he received the within bill of exceptions on the ninth day of June, 1891, and
57 served a copy of the same on Messrs. Woody & Webster, attorneys for the plaintiff, by depositing the same in the United States post office in the city of Helena, Montana, on this ninth day

of June, 1891, and prepaying full postage thereon, as required by law; which said bill of exceptions was duly addressed to the said firm of Woody & Webster, attorneys-at-law, Missoula, Montana.

C. LINKENBACK.

Subscribed and sworn to before me this ninth day of June, 1891.

CHARLES H. COOPER,
Notary Public.

(Endorsed:) No. 54. In circuit court U. S., district of Montana. A. J. Urlin *vs.* Northern Pacific Railroad Company. Bill of exceptions presented by def't. Filed June 10th, 1891. Geo. W. Sproule, clerk. Cullen, Sanders and Shelton, att'ys for def't.

And afterwards, to wit, on the 19th day of June, 1891, the following further proceedings were had and entered herein, viz: Defendant filed its petition to set aside verdict and judgment; which said petition is in the words and figures following, viz:

58 In the Circuit Court of the United States for the Ninth Circuit, District of Montana.

ALFRED J. URLIN, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Now comes the defendant and respectfully petitions the court to vacate and set aside the verdict and judgment rendered in the above-entitled action and to grant a new trial therein for the reasons following, to wit:

I.

The evidence in said cause was insufficient to justify the verdict and judgment rendered therein, in this, to wit:

a. The evidence shows that the car in which the plaintiff was a passenger was derailed at a point about sixty feet west of the switch at Gold Creek, Montana, and there is no evidence showing or tending to show that there were rotten ties in the road at that point or that a rotten tie or ties caused such derailment.

b. The evidence shows that at the point where the said car was derailed there were more than enough sound ties under the rails to render the road absolutely safe for the passage of trains over it.

c. The evidence shows conclusively that the derailment of said car was not caused by rotten ties, but arose from some other cause.

59 II.

Excessive damages appearing to have been given under the influence of passion or prejudice. There is no evidence showing that plaintiff was in receipt of any salary or earning anything prior to the date of his injury or was accumulating anything from the grocery business which it is alleged he was then carrying on. The evidence therefore did not afford the jury any basis for estimating

damages for loss of time while plaintiff was confined in the hospital. There is no evidence showing that plaintiff paid for any medicine, medical treatment, or nursing during the time he was so in the hospital or afterward. It conclusively appears that plaintiff was only confined in the hospital from the 2nd day of July to the 15th day of August, 1888, at which latter date he was discharged from the hospital as convalescent. It also conclusively appears from the evidence that no vital organ has been injured or permanently impaired by the injuries sustained by the plaintiff, and that he sustained no permanent physical injury except the separation of the ninth and tenth ribs from the costal cartilage on the left side, and the evidence shows that such injury, though permanent, is not painful, nor does it impair plaintiff's health or tend to shorten his life.

III.

Irregularities occurring at the trial, in that the court submitted to the jury certain special issues and required them to find thereon, which said special issues were returned by said jury into court, but were not signed by the foreman of the jury as required by law; nor were the answers to said special issues signed by the foreman of the jury or any other person or at all.

60 IV.

Errors in law occurring at the trial and duly excepted to by the defendant, in this, to wit:

a. The court erred in refusing to strike out of the interrogatories to be propounded to the witness Calvin De Witt plaintiff's direct interrogatory numbered thirteen, for that said interrogatory called for an opinion from said witness upon a purely non-professional matter and one which it was the province of the jury to find after hearing testimony as to the methods employed in making the examination.

b. The court erred in denying the motion of defendant to suppress the deposition of Dr. W. P. Mills for the reason that it does not appear in and by said deposition that the said witness before testifying and giving his deposition was cautioned and sworn as required by law.

c. The court erred in denying defendant's motion to strike from the deposition of Dr. W. P. Mills the first and second question and answer asked the said witness by plaintiff on his redirect examination, for that the said questions and answers were not redirect to anything called out on cross-examination of said witness by the defendant, and for the further reason that the testimony so elicited was irrelevant and immaterial.

d. The court erred in permitting the plaintiff to answer the question asked him on his examination as a witness on his own behalf as to the effect of the injuries received by him with reference to attending to any business, for that the question called for an opinion from the witness as to his capacity to labor and as to the permanency or otherwise of the injuries which he claimed to have received

through the defendant's negligence, and was the issue to be tried by the jury.

The court also erred in overruling defendant's objection to
61 the following question asked plaintiff while testifying in his own behalf, to wit:

"Q. What is your condition physically now and since you received these injuries as compared with your physical condition at and immediately prior thereto?" for the reason already stated.

e. The court erred in sustaining the objection made by plaintiff to the question put to him on cross-examination as to the value of the grocery stock carried by him prior to the accident for the reason that the said question was entirely competent on cross-examination to show the extent of the business in which plaintiff had been engaged prior to the accident.

f. The court erred in the admission of testimony in other matters as more fully pointed out and specified in defendant's bill of exceptions herein.

Wherefore your petitioner prays that the said verdict and judgment rendered against it be set aside and held for naught and that it be granted a new trial herein.

CULLEN, SANDERS & SHELTON,
Attorneys for Defendant.

Dated this 15th day of June, 1891.

Service of within petition admitted this 18th day of June, A. D. 1891.

WOODY & WEBSTER,
Att'ys for Pl'ff.

Let the foregoing petition for new trial be filed.

HIRAM KNOWLES, *Judge.*

(Endorsed:) No. 54. In the circuit court of the United States for the ninth circuit, district of Montana. Alfred J. Urlin, plaintiff, *vs.* Nor. Pac. R. R. Co., defendant. Petition to set aside verdict and judgment. Filed June 18th, 1891. Geo. W. Sproule, clerk. Cullen, Sanders & Shelton, attorneys for defendant.

62 And afterwards, to wit, on the said 19th day of June, 1891, the following further proceedings were had and entered of record in the words and figures following, viz:

At a stated term, to wit, the April term, A. D. 1891, of the circuit court of the United States of America of the ninth judicial circuit in and for the district of Montana, held at the court-room, in the city of Helena and county of Lewis and Clarke, on Friday, the 19th day of June, A. D. 1891.

Present: The Honorable Hiram Knowles, United States district judge for the district of Montana.

A. J. URLIN
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY. } No. 54.

This cause came on this day for hearing upon the motion of defendant for a new trial, and after consideration by the court it is ordered that said motion be, and the same hereby is, denied and overruled.

I hereby certify that the above and foregoing is a full, true, and correct copy of an original order made and entered in the thereinentitled cause.

Attest my hand and the seal of said circuit court this 1st day of July, A. D. 1891.

[Seal United States Circuit Court, District of Montana, 1890.]

GEO. W. SPROULE, *Clerk.*

And thereafter, to wit, on the 29th day of June, 1891, defendant filed its assignment of errors herein; which said assignment of errors is in the words and figures following, viz:

63 In the Circuit Court of the United States for the Ninth Circuit, District of Montana.

ALFRED J. URLIN, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

Comes now the Northern Pacific Railroad Company, by Cullen, Sanders & Shelton, and says that in the record and proceedings in the above-entitled action there is manifest error, in this, to wit:

I. The court erred in permitting plaintiff to propound to the witness Dr. Calvin De Witt the interrogatory in said deposition numbered thirteen. The court also erred in permitting the same question to be propounded to the witness Dr. W. P. Mills, the said testimony so elicited being incompetent in this, to wit, that the witness should have been required to state what was done in and about the making of such examination, and the question as to whether the same was thorough or superficial was a question of fact to be found by the jury in determining what weight should be given to the testimony of the witnesses respectively.

II. The court erred in refusing to suppress the deposition of Dr. W. P. Mills, for that it did not appear in and by said deposition or at all that the said witness, before testifying, was cautioned and duly sworn to testify the whole truth of his knowledge in said cause, as required by the statute.

64 III. The court erred in not suppressing those parts of the depositions of said witnesses, Mills and De Witt, which related to the statements of the plaintiff made to said witnesses while he was undergoing examinations made by them, it clearly appearing that such examinations were made by them for the purpose of

enabling them *them* to testify as witnesses on the trial of this action.

IV. The court erred in not suppressing so much of the testimony of Dr. Mills as related to a microscopic examination of plaintiff's expectorations by one Dr. Hencke, it not appearing that the witness was present thereat, for the reason that such testimony was clearly hearsay.

V. The court erred in permitting the testimony of the witness Dr. Mills, given on redirect examination, as to his employment by the defendant to go to the jury, for the reason that it did not relate to any new matter called out by the defendant on cross-examination, and, if material, should have been given by the witness on his examination-in-chief.

VI. The court erred in allowing the said witness to testify that the condition of plaintiff was better during warm weather than it was during the fall and winter months, the question asked the witness being leading and the testimony elicited being incompetent, immaterial, and irrelevant. It was not shown that plaintiff was in fact better during the warm months than during the fall and winter months.

VII. The court erred in overruling the objection made by the defendant to questions put to the plaintiff, when testifying as a
65 witness in his own behalf, as to his having a gathering of water inwardly as for his reasons for not doing anything subsequent to the occurrence of the accident by which he was injured, and particularly in admitting the opinion of the witness as to his condition physically since receiving his injuries, compared with his physical condition immediately prior thereto, for the reason that all of such testimony was and is incompetent. The physical condition of the plaintiff prior to the occurrence of the accident and what it was afterward was an issue of fact to be tried and determined by the jury and was the one material issue in the case.

VIII. The court erred in not allowing the counsel for the defendant to enquire of the plaintiff on cross-examination as to the amount of stock carried by him in the grocery business which he was conducting just prior to the occurrence of the accident by which he was injured. An inquiry into the details of the business so conducted by him and the loss of which formed an element of his damage was competent and material on cross-examination.

IX. The court erred in overruling the objections made to the questions asked the witness Toner with reference to what a person could see in passing over the ties, and also in permitting the witness to give his opinion as to whether the ties were sound enough to hold a railroad spike, the witness not being an expert witness.

X. The court also erred in permitting the witness Anthony to give testimony as to the condition of the railroad ties at a
66 time long previous to the occurrence of the accident and at places remote from where the accident occurred.

XI. The admission of testimony, over defendant's objection, to the effect that the witness Choquette had not seen plaintiff do any work since the occurrence of the accident was error.

The admission of like testimony from the plaintiff on rebuttal was also error, the material question being not what plaintiff had done or attempted to do, but what was his physical capacity for performing any kind of labor.

XII. The court erred in refusing to give to the jury the eleventh instruction requested by the defendant for the reason that the same was material and was not covered by the charge to the jury.

Wherefore the said The Northern Pacific Railroad Company prays that the said judgment so entered against it in the said circuit court of the ninth circuit within and for the district of Montana, and in favor of the said plaintiff, may be reversed and held for naught, and that it have such other and further relief in the premises as may be just.

CULLEN, SANDERS & SHELTON,
Attorneys for Defendant.

(Endorsed:) No. 54. In the circuit court of the United States for the ninth circuit, district of Montana. A. J. Urlin, plaintiff, *vs.* Nor. Pac. Railroad Co., defendant. Assignment of errors. Filed June 29th, 1891. Geo. W. Sproule, clerk. Cullen, Sanders & Shelton, attorneys for defendant.

67 And afterwards, to wit, on the 1st day of July, 1891, a bond was filed in said clerk's office in said cause; which said bond is in the words and figures following, to wit:

In the Circuit Court of the United States for the Ninth Circuit, District of Montana.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
ALFRED J. URLIN, Defendant in Error.

Know all men by these presents that we, The Northern Pacific Railroad Company, as principal, and S. T. Hauser and E. W. Beattie, of the city of Helena, county of Lewis and Clarke, State of Montana, as sureties, are held and firmly bound unto the above-named Alfred J. Urlin in the sum of twelve thousand dollars, lawful money of the United States, to be paid to the said Alfred J. Urlin; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of June, A. D. one thousand eight hundred and ninety-one.

Whereas the above-named The Northern Pacific Railroad Company has prosecuted a writ of error to the Supreme Court of the United States to reverse a judgment rendered and entered in the above-entitled action by the circuit court of the United States for the ninth circuit, district of Montana; which said judgment was so rendered on the — day of May, A. D. 1891:

Now, therefore, the condition of this obligation is such that
68 if the above-named The Northern Pacific Railroad Company shall prosecute its said writ of error to effect and answer all damages and costs if it fail to make its said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE NORTHERN PACIFIC RAILROAD CO.,
By CULLEN, SANDERS & SHELTON,
Division Counsel for State of Montana.
S. T. HAUSER. [SEAL.]
E. W. BEATTIE. [SEAL.]

STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

S. T. Hauser and E. W. Beattie, each being duly sworn, each for himself says: I am worth the amount specified in the above obligation over and above all my just debts and liabilities, exclusive of my property by law exempt from execution.

S. T. HAUSER.
E. W. BEATTIE.

Subscribed and sworn to before me this 30th day of June, A. D. 1891.

W. E. CULLEN,
Notary Public.

This the 1st day of July, A. D. 1891, approved by—

HIRAM KNOWLES, *Judge.*

(Endorsed:) No. 54. In the circuit court of the United States for the ninth circuit, district of Montana. A. J. Urlin, plaintiff, *vs.* Nor. Pac. Railroad Co., defendant. Supersedeas bond. Filed July 1st, 1891. Geo. W. Sproule, clerk. Cullen, Sanders & Shelton, attorneys for defendant.

69 UNITED STATES OF AMERICA, } ss:
District of Montana, }

Circuit Court of the United States, Ninth Circuit, District of Montana.

I, George W. Sproule, clerk of said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing volume, consisting of 69 pages, numbered consecutively from 1 to 69, inclusive, is a true and complete transcript of the records, process, pleadings, orders, judgment, and other proceedings in said cause and of the whole thereof as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included

within said paging the original citation, together with the proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Helena, in the district of Montana, this 13th day of August, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and fifteenth.

[Seal United States Circuit Court, District of Montana, 1890.]

GEORGE W. SPROULE, *Clerk.*

Endorsed on cover: Case No. 14,811. Montana C. C. U. S. No. 272. The Northern Pacific Railroad Company, plaintiff in error, *vs.* Alfred J. Urlin. Filed August 19, 1891.

158-271

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,
vs.
ALFRED J. URLIN,
Defendant in Error.

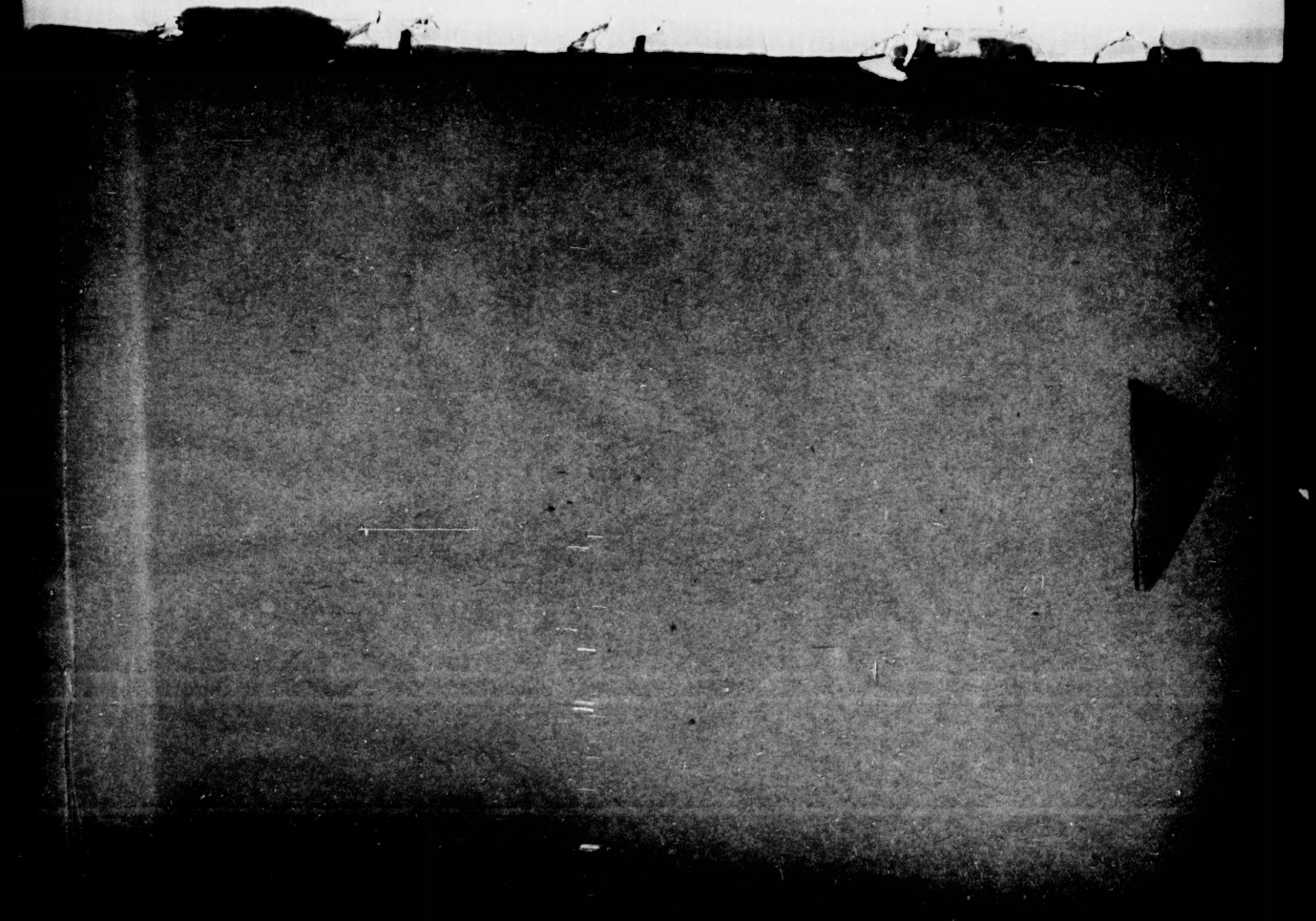
No. 272.

In Error to the Circuit Court of the United States for the District of Montana.

BRIEF FOR PLAINTIFF IN ERROR.

A. H. GARLAND,
W. E. CULLEN,
J. K. TOOLE,
Attorneys for Plaintiff in Error.

McGILL & WALLACE, Law Printers, Washington, D. C.



Supreme Court of the United States.

OCTOBER TERM, 1894.

THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,

vs.

ALFRED J. URLIN, Defendant in Error.

No. 272.

In Error to the Circuit Court of the United States for the District of Montana.

BRIEF FOR PLAINTIFF IN ERROR.

The defendant in error in this case was a passenger on the railroad of the plaintiff in error, between the stations of Missoula and Garrison, in the State of Montana, on or about the first day of July, 1888. Some of the cars of the train on which he was a passenger were derailed at or near a station called Gold Creek, and the car on which he was riding was thrown down a bank and overturned. The complaint charges that this accident was due to the "defective, decayed, and rotten condition of the cross-ties" in the road at the point where the accident occurred, and that the defendant in error by reason thereof suffered injuries as follows: "One of his teeth was fractured and broken and he otherwise received severe and dangerous wounds and internal injuries." The plaintiff in error answered denying the

material allegations and the right to relief (Rec., 9), and the case went to trial. On the trial it appeared from Urlin's own testimony (Rec., 21,) that when the car in which he was riding was overturned he was rendered insensible, only regaining his consciousness after he got outside the car. After freeing himself from the wreck and getting out of the overturned car, he walked some distance down the road-bed observing the condition of the cross-ties which he found were rotten. Up to this time he did not know that he was injured, but upon attempting to stoop to pick up a piece of one of these rotten cross-ties, presumably as evidence to be introduced on the trial of his case, he found that he could not do so, and that he was injured. Thereupon he turned around, and without assistance walked some distance to the smoking-car, into which he was helped, and was taken thence to Garrison, and the next day to Missoula, where he was placed in the hospital of the Northern Pacific Beneficial Association. He remained in the company's hospital from that time until about the 15th day of August following, when he was discharged as convalescent. His injuries as detailed by himself (Rec., 21,) consisted of having three ribs broken on the left side, one of which ran into his left lung, causing a wound therein, from which blood flowed a portion of the time while he was in the hospital. He was bruised about the face and head and had one tooth broken. He further claimed that he had received some injuries to his bowels, but this was predicated upon the fact that he was more or less constipated while he was confined in the hospital. This, of course, was the natural result of his enforced inactivity, and would occur to a perfectly sound and healthy person confined to his room for a period of six weeks.

As to the perforation of the left lung, by one of the broken ribs, it is fair to say that there was no evidence

corroborating this claim of the plaintiff in the court below, defendant in error here. If a broken rib had actually penetrated either lung, the result would have been much more serious in all reasonable probability. He would not have been discharged as convalescent from any hospital within six weeks after the accident, if he had received any such injury as this. If the lung had been pierced, a hemorrhage would have followed immediately, and he would not have been walking around the scene of the accident hunting for a piece of rotten railroad tie with which to convict the plaintiff in error of negligence in the maintenance of its railroad.

The jury, if they found that the accident resulted from the negligence of the railroad company, were authorized by the court, in its charge, to assess compensatory damages only. (Rec., 21.) The injuries for which the defendant was thus entitled to be compensated may be briefly summarized as follows: He had two ribs broken and two dislocated from the costal cartilage; he was confined in the Northern Pacific hospital in Missoula for a period of six weeks; he is entitled to compensation for loss of time during his confinement, and for the pain and suffering endured, but there was no permanent injury resulted to him from the accident except the breaking of a tooth and the separation of the ends of two of his ribs from the costal cartilage, and as to this it was conclusively shown that it was not painful; that it did not impair his health or strength, or tend in any way to shorten his life. There was no testimony that he ever paid out a dollar for medical attendance or nursing, either while he was in the hospital or after he left it, nor was any claim made by him, either in his complaint or on the trial, that he had done so. Compensation, therefore, for the items above enumerated was what he was entitled to recover, and, everything considered, it is fair to say that $500 would have been a generous compensa-

tion, and $1,000 an exorbitant remuneration for all injuries for which, under the court's instruction, he was entitled to recover. Nevertheless, with that reckless generosity which is characteristic of the Montana jury in cases where railroad companies are defendants, the jury in this case returned a verdict of $7,750, for which sum a judgment was entered up against the company, notwithstanding a motion for a new trial, based in part upon the excessive damages thus given. It is to reverse this excessive verdict and the judgment entered thereon that this writ of error is sued out. In discussing the matters which we think should entitle us to this relief, it will be convenient to take them up and consider them in the order in which they are found stated in our assignment of errors. (Rec., 36.)

I.

A Witness Should Not be Allowed to Give His Opinion on the Exact Issue to be Found by the Jury.

The court permitted the following question to be asked the witness, Dr. Calvin DeWitt (Rec., 17), and the witness, Dr. W. P. Mills (Rec., 19), viz.:

"Were the examinations made by you and the other physicians made in a superficial or in a careful and thorough manner?"

The question was objectionable, not only as being leading and suggesting the answer desired to be elicited from the witness, but also because it was taking from the jury the very question which of necessity it was obliged to find, in order to determine the weight to be given to the testimony of these witnesses. The method of making the examination, what was done by the physicians,

should have been detailed, and from this testimony it would have then been the province of the jury to determine whether the examination thus made was thorough or otherwise. It was not a matter about which they were entitled to express an opinion as experts, but a question of fact as to what was actually done by them or in their presence. If they had met the defendant in error casually on the street, and inquired of him as to his symptoms, or formed or expressed an opinion as to his condition from seeing him passing, or about his ordinary business, it is clear that such an opinion would have carried with it much less weight than if they had, in some suitable place, and under proper conditions, attempted to ascertain, by means of proper instruments and methods approved by medical science, the exact condition of his vital organs and the character and extent of any injuries from which he was suffering. The jury were instructed that they were the exclusive judges of the weight of the testimony, and it is a well-established principle that the opinion of a witness to the very fact to be found by the jury is not admissible. This principle is well illustrated by actions for the recovery of damages. Says Dillon, Judge, in Proiser *v.* Wapello, 18 Ia., 327, where witnesses had been permitted to testify as to the amount of damage to certain lands:

"This action of the court was clearly erroneous. This, if allowed, would make the witness perform the functions of the jury."

Harrison, Iowa & Midland R. R. Co., 36 Ia., 323;
Alabama & F. R. R. Co. *v.* Burkett, 42 Ala., 83;
B. & M. R. R. Co. *v.* Schultz, 14 Neb., 421;
Dalzell *v.* Davenport, 14 Ia., 437.

II.

Statutes Authorizing the Taking of Depositions are in Derogation of Common Law, and Should be Strictly Construed.

The second assignment of error is based on the refusal of the court to suppress the deposition of Dr. W. P. Mills, for the reason that it did not appear that the witness was cautioned and sworn before testifying, as required by the statute. Sec. 864, U. S. Rev. Stats., provides :

" Every person deposing, as provided in the preceding section, shall be cautioned and sworn to testify to the whole truth, and carefully examined.

" The authority to take testimony in this manner being in derogation of the rules of the common law, has always been construed strictly; and, therefore, it is necessary to establish that all the requisites of the law have been complied with before such testimony is admissible."

Bell v. *Morrison*, 1 Pet., 351.

The fact should plainly appear from the certificate of the officer before whom the deposition was taken, that all the requisites of the statute were fully complied with, and the court will not indulge any presumption to supply such defects. Says the court in the case last cited :

"And, we think, in a case of this nature, where evidence is sought to be admitted contrary to the rules of the common law, something more than a mere presumption should exist that it was rightly taken. There ought to be direct proof that the requisitions of the statute have been fully complied with."

In *Cook* v. *Burnley, 11 Wall., 659,* a deposition was excluded because it did not appear from the certificate that it had been reduced to writing by the magistrate, or that it was done by the witness in his presence.

Where the statute under which a deposition was taken, required, as most of them do, that a deponent should be sworn, "to testify the truth, and nothing but the truth, relating to the cause or matter for which the deposition is to be taken," and the certificate only stated that "the deponent was first sworn according to law," or "duly sworn according to law," the deposition has been suppressed.

Parsons v. *Huff, 38 Me., 137;*
Brighton v. *Walker, 35 Me., 132;*
Erskine v. *Boyd, id., 511;*
Fabyan v. *Adams, 15 N. H., 371;*
Rainer v. *Haynes, 1 Hemp., 689;*
Putnam v. *Lannimore, Wright, Ohio, 746;*
Simpson v. *Carlton, 1 Allen, 109.*

The certificate of the officer in this case did not show that the witness, Mills, was duly "*cautioned and sworn to testify the whole truth,*" nor did that fact appear from any other part of the Record. The motion of plaintiff in error to suppress the deposition of Dr. Mills should have been sustained.

III.

Self-serving Declarations should not be Admitted, though made to a Physician for the Purpose of Qualifying Him as a Witness.

The next, and perhaps the most serious, objection which we have to make to the depositions of Dr. Mills and Dr. DeWitt, is embraced in our third assignment of error, and consists in the refusal of the court to suppress those parts of their respective depositions which relate to statements made to them relative to his condition by the defendant in error when he submitted himself to some

kind of an examination at their hands in order that they might qualify themselves as witnesses in his behalf, in this action, which he was then about to commence. The defendant in error had been discharged from the Northern Pacific Hospital, at Missoula, Montana, on the 15th day of August, 1888, and the examination to which these two witnesses testify was made on the 25th day of November, 1888, three days before he verified his complaint herein. There is no pretense that these medical gentlemen, or either of them, were called to treat the defendant in error professionally, or for any other purpose than to enable them to testify in this case. The fact that the examination was made by them jointly, at the same time, and within three days of the verification of this complaint, seems to be satisfactory proof of the object and purpose of this examination. In testifying about the examination thus made, their depositions contain numerous statements made by the defendant in error to them during the progress of the examination. For example, Dr. Mills says in his deposition: "Patient complained of pain on pressure; all over depression, but was marked in region just mentioned." "Complained of pain on pressure on left side of abdomen, from border of ribs, of chest, of ileum; inability to lay on left side, and when on right side progging pain on left, as if bowels were hanging; his indigestion constant; eructation of wind (gas from stomach), and *states* he passes per rectum a quantity in the morning; complains of constipation, accompanied by pain, unless relieved by fruit or medicine; states he sleeps little." "But he had tried to take solid food several times, which caused distress in stomach and bowels," and also, "And sleep very much broken. At all times he suffered much more pain in bowels, stomach, and lungs, since taking cold." And again: "He complains of pain on pressure, and when lying down. * * * And when lying down he has pain,

except when he assumes a certain position, in region of stomach and colon, left side angle cardiac end of stomach, and left end of transverse and angle, and portion of the descending colon; and complains of constipation and accumulation of gas in that portion of the bowels. Says he must live on fruit." (Rec., pp. 18 and 19.)

What an admirable method this is of getting before a jury the unsworn statements of a party to a suit, made under the strongest temptation to feign or exaggerate the symptoms he details, and not only this, but they come to the jury in the sworn testimony of reputable physicians, carrying with them the tacit endorsement of these learned and expert witnesses. And, further, these unsworn complaints of the defendant in error, made as suggested under the strongest possible temptation to exaggerate the pain and ailments from which he was suffering, gain in force and importance by the medium through which they are communicated to the jury. Instead of being simple expressions of pain, or statements of symptoms, in the simple language of the real witness, the party himself, they are stated in the scientific terms used by the profession in describing diseases and ailments. Many of the terms employed are little used in ordinary speech, and the jury are easily misled into thinking them of much greater significance than they really are. The mischief of this sort of testimony is readily seen in a case like the one at bar. Here is a man who was a passenger on a railroad train, and the car on which he was riding was derailed and turned over. These facts established before an ordinary jury are all that is necessary to entitle him to recover, and the only thing wanting is sufficient personal injury to enable him to recover a handsome verdict. He had one tooth broken in the accident, and a couple of ribs, this latter injury requiring his detention in the hospital for a period of six weeks, but as to this injury, in the language of one

of his own witnesses, "there was no perceptible enlargement, and nothing that was abnormal." The testimony, therefore, which was to, and did, entitle him to the more than munificent verdict which he recovered, was testimony as to aches and pains, that left behind them no evidence of their existence; latent difficulties that medical science could neither discover nor relieve. He could be, and was, a witness on his own behalf on the trial of this case, but it is so much easier to testify to sympathetic physicians about these things than it is to testify in court under the obligations of an oath and subject to cross-examination.

A number of authorities can be found approving of the admission in evidence of declarations of pain, suffering, actions, groans, outcries, and expressions of distress made by the injured person, sometimes made so shortly after the occurrence of the accident as to be a part of the *res gestæ*, and in other cases at periods more remote from the occurrence of the accident. The admission of such testimony was justified on the ground that it was the best evidence obtainable of the facts to be proven, and in some cases it was sought to be classed as original evidence. The courts allowing this class of testimony, while admitting that statements made out of court and without the sanction of an oath are dangerous as evidence, and that the rights of suitors should not be put in peril by them, have almost uniformly sought to justify it on the necessities of the case, and the inability of the party, not being competent to testify on his own behalf, to give proof of a higher and more satisfactory character. Since this restriction has been removed and parties have been made competent witnesses in their own behalf, there does not seem to be any reason for the rule, and accordingly it will be found that recent decisions do not permit this character of testimony. The exact question here presented has not, so far as we can find, been passed on by this

court. In the case of *Travellers' Ins. Co.* v. *Mosely, 8 Wall., 397*, the court had under consideration the question as to whether the declarations of the deceased as to his bodily injuries and pain, made shortly after the occurrence of the accident, were admissible to prove the accident which had caused them. It was there held that these expressions of pain, etc., were made so shortly after the occurrence of the accident as to be a part of the *res gestæ*. The decision was by a divided court, and the case has not been cited by this court as an authority in any subsequent decision.

The rule permitting such evidence was at one time firmly established in the State of New York. In the case of *Caldwell* v. *Murphy, 11 N. Y., 416*, the witness was asked as to the condition of the plaintiff's health subsequent to the accident. He replied: "He has invariably complained," etc. The answer was objected to, but the testimony was held admissible. This case was followed in *Werely* v. *Persons, 28 N. Y., 344*, and in other cases. The case of *Reed* v. *N. Y. C. R. R. Co., 45 N. Y., 574*, seems to have been an attempt to extend this very convenient rule. The plaintiff in that case sought to prove certain declarations he had made to a third person relative to the state of his health. Allen, J., after reviewing the decisions of the courts of that State and others supporting the rule, says:

"But by the amendment of the code in 1869 (§ 398), there is no longer a necessity for giving in evidence the declarations of a party if he is living and able to be sworn and examined as a witness; and the reason of the rule ceasing, the rule itself, adopted with reluctance, and followed doubtingly and cautiously, should cease."

In the case of *Hajenlocker* v. *C., I. & B. R. R. Co., 99 N. Y., 136*, there seems to have been a return to the rule; but in the case of *Roche* v. *B., C. & N. R. R. Co., 105 N.*

Y., 294, it was again set aside. In this case Peckham J., says:

"But evidence of simple declarations of a party made some time after the injury, and to a physician for the purpose of being attended professionally, and simply making the statement that he or she is then suffering pain, is evidence of a totally different nature, is easily stated, liable to gross exaggeration, and of a most dangerous tendency, while the former necessity for its admission has wholly ceased."

It is to be remembered that the testimony objected to in the case at bar does not consist of exclamations of pain, groans or screams, but it is the declarations of the defendant in error as to his physicial condition, and such declarations were evidently made for the purpose of aggravating the damages in the case which he was then about to bring.

The rule admitting self-serving declarations of a party, made to a physician or other person, in evidence has had about the same history in Michigan that it has had in New York. It seems to have been quite firmly established by the cases of *Hyatt* v. *Adams, 16 Mich., 180; Johnson* v. *McKee, 27 Mich., 471; Elliot* v. *Van Buren, 33 Mich., 49; and Mays* v. *Wright, 63 Mich., 32*, but it was totally repudiated in *Jones* v. *President, etc., Village of Portland, 88 Mich., 371*, where the authorities in support of it, both American and English, are quite fully reviewed. This case is very like the one at bar in some of its features. The plaintiff was injured by a fall caused by a defective cross-walk. Two physicians were employed for the double purpose of treating the lady and also to qualify them to be witnesses in the case which her husband intended to bring against the corporate authorities of the village on account of the accident. On the trial they were allowed to testify to the complaints she made to them, and her statements of pain and suffer-

ing during the examination made by them. As in the case at bar, the external evidences of injury were very slight indeed. They discovered a slight discoloration on the left hip and a fullness at her knee, which were the only indications they found of any ailments, and which, independently of her assertion that she had been injured, they would have attributed to rheumatism. The court, after quoting approvingly from *Railroad Co.* v. *Huntley, 38 Mich., 544,* says:

"The reason why such testimony is incompetent when given by third persons, either as original, or corroborative testimony, is that it is giving in evidence the *ex parte* statements of a party to a suit upon points material to the issue, and made for the purpose of being testified to and given in evidence in a suit already pending or to be brought. Such testimony is incapable of contradiction. It has all the evils of manufactured testimony without any possible means of detecting the falsity of it. In this State a party can testify to his assertions of pain and suffering, mental or physical, but a party can not be allowed to corroborate such testimony by witnesses employed to listen to such statements with a view to a suit to be brought or pending."

We do not think it necessary to pursue this question further. Some of the States in which this exception to the general rule forbidding hearsay testimony has been engrafted upon their jurisprudence, still adhere to it. In others, as in New York and Michigan, it has been expressly repudiated. It has everywhere been established reluctantly, and only because of necessity. Now that the necessity no longer exists, because of the very general permission given parties to be witnesses in their own behalf, it is not too much to hope that such a very pernicious principle will not find a foothold in any jurisdiction where it has not become established.

The testimony on the part of the defendant in error, with reference to his injuries, which, as before suggested,

was the one material issue in the case, was largely made up of his own declarations to third parties. Take, for example, the testimony of the witness, Lombard (Rec., 26), who was permitted to testify over defendant's objection, that "Mr. Urlin frequently told him about his sufferings and where he suffered pain; that it was in his side principally; that he was obliged to eat fruit to keep from being constipated; that he suffered continually, and frequently talked to witness about it." Again, in the testimony of his family physician, Dr. Choquette (Rec., 26), who had been his physician and surgeon for a period of thirteen years, mention is made of the complaints of pain made to him. In short, were it not for this manufactured testimony, the actual injuries which the defendant in error could prove would scarcely entitle him to more than nominal damages.

See, also, 1 Greenl. Ev. (14th ed.), § 102, note b, and cases cited.

Speaking of this kind of evidence the court, in Bacon *v.* Inhabitants, &c., 7 Cush. (Mass.), says:

"Such evidence, however, is not to be extended beyond the necessity on which the rule is founded. Anything in the nature of *narration* or *statement* is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations, and expressions as usually and naturally accompany, and furnish evidence of, a *present* existing pain or malady."

IV.

Hearsay Testimony Not Admissible.

Our fourth assignment of error is addressed to the admission in evidence of testimony as to what one Dr. Hencke, who assisted at the examination of the defendant in error, by Dr. Mills and Dr. DeWitt, on the 25th day of November, 1888, found in certain expectoration

furnished him for microscopic examination. Dr. Hencke died between the date of the examination and the trial. The microscopic examination appeared from the testimony to have been made by him alone, unassisted by the other physicians, and not even in their presence. Consequently, the testimony of Dr. Mills that "At this time Mr. Urlin furnished some expectoration for examination by Dr. Hencke under the microscope, which showed pus, blood, and mucus" (Rec., p. 18), was sheer hearsay. Dr. Mills did not pretend that he had made any examination to determine whether there was pus, blood, or mucus in the expectoration of the defendant in error, and it was evident that all he knew about it he must have learned from Dr. Hencke. It is difficult to understand upon what principle the judge who presided at the trial of this case admitted this testimony. Of course, it does not necessarily follow that if the defendant in error was spitting pus, blood, and mucus at the time his physicians made this examination, it resulted from injuries caused by this accident, and hence it may be said that, while the admission of this testimony was error, it does not appear that any injury resulted to the plaintiff in error therefrom. We understand the rule of this court to be that while it will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, a reversal will be directed unless it appear beyond doubt that the error did not and could not have prejudiced the rights of the party against whom it was admitted.

Vicksburgh & Meridian R. R. Co. v. *O'Brien, 119 U. S., 99, and authorities cited.*

And if there be an equal chance that the jury were influenced by this, a new trial will be granted. (Wardell *v.* Hughes, 3 Wend. (N. Y.), 416; Inglish *v.* Breneman, 5 Ark., 383.

V.

Redirect Examination should be Confined to New Matter Called Out on the Cross-Examination.

Upon the redirect examination of the witness, Dr. Mills, he was asked the following question, viz.:

"Were you some two or three years since employed by the Northern Pacific Railroad Company as a physician and surgeon on the Rocky Mountain Division of that road, and, if so, what were your duties as such?" And also the further question: "During the time you were so employed were you at any time, in the absence of the chief surgeon of the Rocky Mountain Division, placed in charge of the railroad hospital at Missoula, and, if so, what length of time were you in that position?" (Rec., 20.)

Objection was made to both of these questions for the reason that they were not in rebuttal of any new matter called out on the cross-examination, and because the testimony was irrelevant and immaterial. These questions might have been material if asked on the direct examination, when the defendant in error was seeking to qualify his witness to testify as an expert, but he had already qualified him by showing at what school he had graduated, how many years he had been engaged in the practice of his profession, and such other facts as in his judgment, and in that of the court, qualified the witness to give his opinion as a physician and surgeon. It was not for the purpose of qualifying the witness, therefore, that these questions were asked, but it was for the purpose of giving added weight to his testimony by showing that he had attained such a position and standing in his profession as that the plaintiff in error had employed him to discharge the responsible and difficult

duties of assistant surgeon of one of the divisions of its railroad, and that during the absence of the chief surgeon he was in charge of its hospital at Missoula. This testimony might have been well enough in the direct examination of the witness, where, possibly, the plaintiff in error on cross-examination might have broken the force of it somewhat, but we respectfully submit that it was error to admit it, over our objection, on the redirect examination of the witness. The rule that a party has no right to cross-examine a witness except as to facts and circumstances connected with the matters stated in his direct examination has been long and well settled in this court.

P. & T. R. R. Co. v. *Stimpson, 14 Pet., 448;*
1 Greenl. Ev. (14th Ed.), § 445 and notes.

The corrollary of this proposition must also be true, that a witness on redirect examination can not be interrogated as to any facts which do not tend to explain new matter called out on his cross-examination.

Fry v. *Leslie, 15 Va. L. J., 37;*
1 Greenl. Ev. (sup.), § 467.

VII.

Leading Questions Should Not be Permitted.

Our sixth assignment of error relates to the admission of incompetent testimony on a question so leading as to be answered in the affirmative, simply by "yes, sir." The adroitness of counsel for the defendant in error, who tried the case in the court below, is well illustrated by the question propounded to the witness, Dr. Mills (Rec., 20):

"State whether or not, from your observation and treatment of Mr. Urlin, if his condition is not really better during warm than during cold and winter months?"

They were trying a case where, practically, the only question in it was one as to the amount of the damages

they were entitled to recover. The question of negligence on the part of the company was a wholly immaterial one. All that was needed as to that, was sufficient evidence to support the verdict, which was sure to be rendered in their favor. Unfortunately the appearance of their client was against the recovery of any very substantial verdict. Outwardly, and visibly, he appeared to be in as good health and as sound, physically, after the accident as he had been prior to it, with the possible exception of a broken tooth, which a dentist could restore in a very short time, and at a very trifling cost. The case was to be tried in the last days of the balmy month of May, just when the life-giving heats of summer were setting in. It would, therefore, to some extent at least, in the eyes of the jury, excuse the sound and healthful appearance of their client, to show that in the fall and winter months he did not look so well. That as cold weather came on there was a marked loss of vitality, owing, of course, to this untoward accident in which he had been knocked insensible, and then got up and went wandering around in search of a piece of "rotten tie" to be used in evidence in the case he was determined to bring. The idea involved in this interrogatory was good. It was ingenious, but, unfortunately, it must fail in its purpose, because it is so clearly leading as not to be permissible.

1 Greenl. Ev. (*sup.*), § 434, and notes.

VII.

Special Damages Not Pleaded are Not Recoverable.

Our seventh assignment of error presents another unwarranted attempt to aggravate damages. The defendant in error was a witness in his own behalf, and was entirely competent to testify as to the aches, pains, and sufferings

which he was enduring at the time he was examined by Drs. Mills, DeWitt, and Hencke, November 25, 1888. He was not interrogated as to these matters, because he had already qualified those eminent medical gentlemen to speak for him as to those matters, but he was asked the question:

"What was your condition at that time?" (Rec., 22.)

This question called for an opinion from the witness upon a subject about which he was not competent to testify. He could tell what particular pains or aches he felt, what food he could eat and digest, and what he could not, how he slept at night, and his symptoms generally at the date when this board of physicians examined him, but his condition was a question which the board had convened to determine. If his *condition* had been the subject of inquiry of the physicians, and his ails and pains and aches at or about the time when this examination was made had been the subject of his testimony, it would have been more in consonance with well-established legal principles. The answer, which was also included in our objection, shows that he was either giving his opinion as an expert or testifying from hearsay. His reply to this question was:

"A gathering of water inwardly."

He certainly did not intend to imply by this answer that this gathering of *water inwardly* was in his bladder, and that it would be in due course of time removed painlessly, by a simple process of nature. He desired the jury to understand by this answer that at that time there was some unusual and abnormal accumulation of water in or near some of his vital organs, which had resulted in some mysterious way from injuries he had received by the overturning of a car in which he was a passenger. This was either a matter of opinion on his

part, or else it was told him by his examining board of physicians, and in either case it was not admissible. Moreover it was an attempt to aggravate damages. In his complaint he specifies the particular injuries for which he thinks he is entitled to damages. One of his teeth was fractured and broken; his ribs in his left side were fractured and broken; * * * in consequence of said injuries so received as aforesaid, his general health has been ruined, and he is permanently disabled and rendered totally unable to attend to any kind of business pursuits and deprived of the comfortable enjoyment of life. We are not notified in this complaint that he will demand damages of us for this "gathering of water inwardly," and hence we are not prepared to meet it; it is poured out upon us for the first time during the trial of this case.

While upon this question of the evident attempt to aggravate damages all through this case, we beg to call attention to the question asked the witness, Dr. J. B. Atchison (Rec., 25):

"I will ask you to state fully in reference to the injuries which you say you found with reference to his spine, and what effect, if any, that of itself would have upon his mental organism?" Not content with trying to prove the injuries specially charged in the complaint, they seek to impart into their case that most insidious and pernicious of all injuries, a "*railroad*" spine, and not content with showing that their client belies his appearance, and is in fact a physical wreck, they wish to show that he is a mental wreck as well. How much of this munificent verdict of seven thousand seven hundred and fifty dollars was for this railroad spine, and how much of it was for the deranged and disabled mind? It is scarcely necessary to call attention to the fact that the allegations of the complaint with reference to the injuries sustained by the defendant in error are allegations of special damage; that they must be proved as laid, and that

testimony of other and independent injuries is not admissible. The case of

Roberts v. *Graham, 6 Wall., 578,*

is directly in point. In that case evidence had been admitted on the trial of other matters of damage than those charged specially in the complaint. This court said:

"It is objected that the plaintiff was allowed to recover for a special damage not alleged in the complaint. As a general proposition that can not be done. Special damage, whether resulting from a tort or breach of a contract, must be specially averred in order that the defendant may be notified of the charge and come prepared to meet it."

We desire to call particular attention to the testimony of Dr. Atchison on this point, to the effect that "plaintiff was a weak man naturally, and that these injuries or this condition of the spine, which he did not know was an injury, resulting from the accident, or a functional trouble, would tend to prevent the plaintiff from following any business," etc. (Rec., 26). Until it was alleged that some injury of the spine existed, resulting from this accident, this testimony was clearly inadmissible.

Returning to the testimony of defendant in error, as a witness in his own behalf (Rec., pp. 22 and 23), after testifying that from the date of receiving his injuries he had been incapacitated from attending to any business, he is asked by his counsel:

"What, if anything, has been the effect of these injuries upon you since receiving them, with reference to attending to any business?"

And, after the witness had testified that since the occurrence of the accident he had done nothing, his counsel is permitted to ask him:

"For what reason have you done nothing?"

And again—

"What is your physical condition now and since you received these injuries, as compared with your physical condition at and immediately prior thereto?"

Each one of these questions called upon this vitally-interested witness not to detail sworn fact within his knowledge, but to express an opinion; and in the case of the last question, at least, it called upon him for an opinion about the identical issue which the twelve men in the jury box were empanelled to try. It might have lessened the labor of the jury somewhat, perhaps, if the inquiry had been made as to how many dollars would, in his opinion, compensate him for his injuries, but as he had already sworn in his complaint that it would require fifty thousand dollars to make him whole, his counsel doubtlessly regarded the question as unnecessary.

Upon the question of admitting evidence of special damages not pleaded, see—

1 Suth. Dam., p. 763, and cases there cited;
2 Sedg. Dam. (8th edn.), § 1261, and notes.

VIII.

A Wide Latitude Should be Allowed on Cross-Examination, Particularly as to Matters Directly in Issue.

One of the most flagrant errors, in our judgment, committed on the trial of this cause was the refusal of the court to permit us to cross-examine the defendant in error with reference to the details of the grocery business in which he had been engaged prior to the occurrence of the accident. The inquiry was made by us as to the amount of stock he carried in his store, with a view, of course, of ascertaining the extent of his loss from this

cause. To this his counsel objected that it was not cross-examination because they had not been permitted to go into details on their examination in chief. (Rec., 23.) They had specially pleaded in their complaint:

"The plaintiff further alleges, by way of special damages, that at the time he received the injuries complained of as aforesaid he was engaged in the business of a merchant, buying, selling, and shipping groceries, provisions, fruits and vegetables at the town of Missoula, this Territory, and that his said business as aforesaid yielded and paid him a sum equal to one hundred dollars per month."
(Rec., 6.)

Then follows the allegation that in consequence of these injuries he was compelled to relinquish it, etc. On the witness stand he testified that at the time he sustained the injuries resulting from this accident he was in the grocery business, and that prior thereto he had been in the lumber business. If there had been no allegation in the complaint with reference to this grocery business, and no special damages alleged for its loss, it would have been manifestly our right to cross-examine this witness to any extent we might have deemed necessary upon this subject. When the loss of this business is alleged and charged as an item of special damages it was our right to go into the details of it to the fullest extent. How could we show that he was not making a net profit of a hundred dollars per month if we were shut off from inquiry as to the amount of stock carried, amount of sales, profits made, etc.? The reason assigned was because they had not been permitted to go into details on their examination-in-chief. Many things are entirely competent on cross-examination which are unnecessary and incompetent on direct-examination. We do not deem it necessary to discuss this proposition further. If there were no other error in this case this one is so flagrant

and outrageous as to compel the reversal of this judgment, even though on every other ground the court might be reluctant to do it.

Greenl. Ev. (*sup.*), § 445, *et seq.*

IX.

Incompetent Testimony Should Not Be Admitted.

The ninth and tenth assignment of errors is directed to the admission of incompetent testimony from the witnesses Toner and Anthony. The defendant in error experienced no little difficulty in showing that there were rotten ties in the railroad track at or near the scene of the accident. In view of other errors presented by this record, we do not deem it essential to discuss these errors at length. We do not, however, desire to be understood as waiving them, and we think that upon an examination of the exceptions found on pages 23, 24, and 25 of the printed Record they will be found to be well taken.

Our eleventh assignment of error is addressed to the admission of testimony of the witness Choquette as to what he had not seen. If testimony as to what the witness had not seen and did not know were competent, the defendant in error on the trial of his case in the court below could have overwhelmed us with a cloud of witnesses. In a case like the one at bar the rule would be a very convenient one to enable the plaintiff to prove what had not occurred and facts which were not true.

In the same line is the question asked plaintiff on his examination in rebuttal (Rec., p. 27). The material thing to be proved, of course, was not what the plaintiff had or had not done after the occurrence of the accident,

but what was his physical capacity for performing labor and to what extent, if at all, it had been impaired by injuries received by him in this accident.

The twelfth assignment of error is predicated upon the refusal of the court to give a short instruction asked for by the company. Counsel for defendant in error, in order to conceal the paucity of their evidence, with reference to there being rotten ties in the railroad track at the point where the derailment occurred, had deftly introduced testimony as to rotten ties at other and remote points from the scene of the accident, and at times long prior to its occurrence. It was, therefore, manifestly proper to call the attention of the jury sharply to the fact that proof that at other and remote points, and at times long previous to the occurrence of the accident, rotten ties had been found in the railroad track, was not sufficient to warrant them in finding that the accident occasioning the injury resulted from rotten cross-ties. About the only testimony in the case upon that point was that of the defendant in error himself, who immediately after receiving $7,750 worth of injury, went mooning around, for half an hour, trying to find a piece of a rotten cross-tie. We think that in all fairness this instruction should have been given. The proposition was not covered by the charge given by the court to the jury, and, for aught that appeared therein, the jury were authorized to believe that evidence that rotten ties had been seen at other and distant points, and long previous to the occurrence of the accident, was sufficient from which to find that a rotten tie in the road-bed was the cause of this accident.

See on this point 1 Greenl. Ev. (14th ed.), § 52, and notes, where the rule is laid down that collateral facts are inadmissible.

Stark Ev. (Notes by Sharswood), marg. p. 617, et seq.

X.

A Verdict Must be Signed by the Foreman of the Jury.

But one thing further demands our attention and only a very brief reference to it is necessary. On the trial of the case the jury returned what was accepted by the court as a special verdict. It consisted of certain questions and answers, but it was not signed by any one nor had it any further authentication than that it was returned into court with other papers in the case. This special verdict appears in the Record at page 14, and is found incorporated in the judgment. (Rec., 15.) The Code of Civil Procedure of the State of Montana, which controlled the trial of this case, provides:

"SEC. 274. The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of plaintiff or defendant; a special verdict is that by which the jury find the facts, only leaving the judgment to the court."

By section 270, it is provided that "The verdict must be in writing, signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict." To the end that mistakes and informalities may be corrected, it is provided as follows:

"SEC. 271. If the verdict be informal or insufficient in not covering the whole issue or issues submitted, or in any particular, the verdict may be corrected by the jury under the advice of the court, or the jury may be again sent out." (Comp. Stats. of Montana, pp. 127–128.)

It is perhaps sufficient to say as to this that the statute requiring that all verdicts shall be in writing and signed by the foreman of the jury, it was error for the court to

receive an unsigned paper as a verdict, and to enter up a judgment reciting as a special verdict the contents of this unsigned paper. In the case of *Prater* v. *Snead, 12 Kans., 347*, the jury, as in the case at bar, presented a general verdict which was signed, and an unsigned special verdict. The court in sending them out to correct the special verdict in this respect, said, "That there was no verdict until the same was signed; that it was their duty to have their foreman sign both the special and general verdicts." On appeal no error was found in this statement. The jury in the case at bar were required to find a special verdict, and a general one; the judgment is based upon both, but as to one there is no verdict. To allow such a judgment to stand would be to establish a very dangerous precedent.

There are other propositions disclosed in this Record, well worthy of consideration, but enough has been said to show conclusively that "a manifest error hath happened to the great damage of the said plaintiff in error, and that it is fit that the error should be duly corrected and speedy justice done to the parties."

A. H. GARLAND,
W. E. CULLEN,
J. K. TOOLE,
Attorneys for Plaintiff in Error.

15-8-271

15-8-271

Office Supreme Court, U. S.
FILED.
MAR 29 1895
JAMES H. McKENNEY,
CLERK.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1894.

THE NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,
vs.
ALFRED J. URLIN.
Defendant in Error.
No. 272.

In Error to the Circuit Court of the United States for the District of Montana.

BRIEF FOR DEFENDANT IN ERROR.

FRANK H. WOODY,
Attorney for Defendant in Error.

DEMOCRAT PRINT, MISSOULA, MONT.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1894.

THE NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,
vs.
ALFRED J. URLIN.
Defendant in Error.
No, 272.

In Error to the Circuit Court of the United States for the District of Montana.

BRIEF FOR DEFENDANT IN ERROR.

This is an action for damages for personal injuries received by the defendant in error, while a passenger on the railroad of the plaintiff in error, between the stations of Missoula and Garrison, in the state of Montana, on or about the first day of July, 1888. Some of the cars of the train, including the one in which the

defendant in error was riding at the time, were derailed at or near a station called Gold Creek, and thrown down an embankment and overturned. The complaint alleges that this accident was caused by the defective, decayed and rotten condition of the cross-ties in the said railroad at the point where the said accident occurred, and that the defendant in error by reason of said accident suffered injuries as follows: "One of his teeth was fractured and broken, and he otherwise received severe and dangerous wounds and internal injuries." The plaintiff in error answered, denying the material allegations of the complaint, and the right to relief, and the case proceeded to trial to a jury and the jury, after hearing all of the evidence in the case, returned a verdict for the defendant in error for the sum of $7,750.00, and also returned certain special findings, which were submitted to the jury at the request of the plaintiff in error (Rec. 14). Judgment was then entered upon said verdict and special findings (Rec. 15). During the trial certain exceptions were saved by plaintiff in error, which were, on the 19th day of June, 1891, allowed and signed by the judge of said court (Rec. 17 32). That afterwards the plaintiff in error presented to the court his petition to vacate and set aside the verdict and judgment rendered in said action and to grant a new trial therein (Rec. 33), which petition was on the first day of July, 1891, denied and overruled (Rec. 36). The plaintiff in error then sued out a writ of error to said circuit court, and brings said cause here for review. The errors assigned upon which a reversal is asked are twelve in number. (See Rec., pages 36 38.)

Counsel for plaintiff in error argue very strenuously

and apparently earnestly to show that the evidence did not warrant the jury in finding the amount of damages returned by them for the defendant in error—plaintiff below—and that the same was excessive.

We do not understand, nor believe, that that question can be raised in this court by writ of error, and that the only questions that this court can determine in this case are such errors as are contained in the assignment of errors contained in the record sent up to this court.

In discussing the matters contained in the record, and upon which we believe the court will be called to pass, we will take them up as contained in the assignment of errors as found in the record (Rec. 36), and also in the order that they have been presented by counsel for plaintiff in error in their brief.

I.

The first assignment of error is, that the trial court erred in permitting counsel for the defendant in error to propound to the witness Dr. Mills (Rec. 19), and the witness Dr. De Witt (Rec. 17), the following question: "Were the examinations made by you and the other physicians made in a superficial or in a careful and thorough manner?" (Rec. 17.)

It is suggested that the question was objectionable on two grounds—first, that it was leading in form, and second, that it called for the opinions of the witnesses. As to the first ground of objection, we think that is fully answered in the subsequent part of this brief in what is said under the sixth assignment of error in regard to leading questions and that nothing further need to be said here on that ground.

Upon the second ground, that it called for the opinions of the witnesses as to the manner in which the examinations made by them and other physicians were made, and, therefore, inadmissible, we cannot agree with counsel for plaintiff in error. These witnesses were reputable physicians, called to testify in a professional capacity as to certain examinations made by them, and other physicians, of the defendant in error, to ascertain what his injuries were, if any, and the extent of the same. That it was perfectly proper for them to say whether said examinations made by them, were made in a superficial or in a careful and thorough manner. They were not giving their opinion as to any ultimate fact to be found by the jury. The ultimate fact to be found by the jury was the amount, if any, that the defendant in error had been damaged by receiving the injury. The fact concerning which they were required to give evidence by said question was the manner in which said examinations were made, and we submit that it was competent for them to say whether the examinations were made in a superficial or in a careful and thorough manner. And we further submit, that it would not have been proper to have submitted to the jury the question as to whether the examinations had been made in a superficial or in a careful and thorough manner, for the reason that jurors generally, being laymen and not physicians or surgeons, would not have been competent to have determined from any detailed statement of facts which might have been given them by the physicians as to the manner in which the examinations were made, whether the examinations had been made in a superficial or in a careful and thorough man-

ner. The witnesses were called as professional medical experts, and we believe that before a jury of laymen, the opinion of such medical experts was the best evidence obtainable as to the manner in which such examinations were made.

We have examined nearly all of the authorities cited by counsel for plaintiff in error on this question, but do not find that any of them are applicable thereto. In each and every one of them that we have examined, the question propounded to the witness, and which was held to be objectionable, was as to the opinion of the witness as to the ultimate fact to be found by the jury; that is, as to the opinion of the witness as to the amount of damages that the plaintiff had sustained by reason of the acts of the defendant, which was a fact to be found by the jury. In the case at bar, the question propounded to the witnesses did not call for any opinion upon the ultimate facts to be found by the jury, and did not in any wise require the witnesses to perform the functions of the jury.

II.

The second assignment of error is based upon the refusal of the court to suppress the deposition of Dr. W. P. Mills, for the reason that it did not appear that the witness was cautioned and sworn before testifying, as required by the statute.

It is not contended that this is not a case in which depositions could be taken and read in evidence in the U. S. Circuit Court under Section 863, U. S. Revised Statutes. In this case the deposition was taken, as shown by the record, page 17, before W. P. Baker, a notary public,

at the City of Missoula, County of Missoula, State of Montana, on the twelfth day of May, 1891. It was taken under the provisions of the laws of Montana, which fact, we think, will be conceded, if the same does not clearly appear from the record.

"When, however the facts are such in a given case "that, under the provision of the statutes of the United "States, the right to take the testimony of the witnesses "exists, then, as to the mere mode of procuring the dep- "osition, parties may follow at their election either the "provisions of the state law or the act of congress."

Flint v. Board Com'rs, 5 Dill. 481;

McLennan v. K. C. St. J. & C. B. R. Co., 22 Fed Rep't 198

In this case defendant in error elected to take the deposition of Dr. W. P. Mills under the state laws, sec 680, of the First Division of the Compiled Laws of Montana under which said deposition was taken reads as follows:

"Either party may attend such examination, and put "such questions—direct and cross—as may be proper. "The deposition, when completed, shall be carefully "read to the witness, and corrected by him in any par- "ticular if desired; it shall then be subscribed by the "witness, certified by the judge, or officer taking the dep- "osition, enclosed in an envelope or wrapper, sealed and "directed to the clerk of the court in which the action is "pending, or to such person as the parties in writing "may agree upon, and either delivered by the judge or "officer to the clerk, or such person, or transmitted "through the mail, or by some safe private opportunity; "and thereupon such deposition may be used by either "party upon the trial or other proceedings against any "party giving or receiving the notice, subject to all le- "gal exceptions. But if the parties attend at the exam- "ination no objection to the form of an interrogatory "shall be made at the trial, unless the same was stated "at the time of the examination."

There is not a word in the whole act in reference to the manner in which the witness shall be sworn or cautioned, or that he shall be cautioned and sworn. And we think the certificate contained in the record was a sufficient compliance with this statute.

We submit that the record shows that the defendant appeared at the time and place of taking said deposition and participated in the taking of the same (Rec., pages 19 and 20), and cross examined the witness.

We further believe, that if there was any irregularity in the manner of cautioning and swearing the witness as contended for by counsel for plaintiff in error, such irregularity was waived by reason of attendance and participation in the taking of said deposition and cross examining such witness.

In *The Mechanics' Bank of Alexandria v. Seton I. Peters (U. S.) 299*, where a question of irregularity was raised in this court for the first time, the Court say:

"Admitting this to have been irregular, no objection "appears to have been made in the court below to the "reading of the deposition; and had it been made, it "ought not to have prevailed even then, because the "defendants cross examined the witness, *which would "be considered a waiver of the irregularity.*

So this court has held that if the party appears and cross examines the witness, it is a waiver of any irregularity in the taking of the deposition.

See *Shutte v. Thompson, 15 Wall 159.*

If the party objecting appear and takes part in the examination of the witness, his objection will be deemed

to be waived. Except as to the legal character of the evidence.

American and Eng. Ency. of Law, Vol V, 616, and authorities there cited.

By reference to the record page 11, it will be seen, that on the sixth day of May, 1891, this cause was called and set down for trial on the twenty fifth day of May, 1891. And by further reference to the record, page 12, it will be seen that the trial of the cause was actually commenced on the twenty sixth day of May, 1891, and continued until the twenty-ninth day of May, 1891, when it closed.

On the twenty fifth day of May, 1891, and before the cause was called for trial, counsel for plaintiff in error filed a written motion to suppress the deposition of said witness Dr. W. P. Mills, which said motion was heard by the court and overruled, to which ruling the counsel for plaintiff in error duly accepted (Rec. p 17).

And on the said twenty fifth day of May, the counsel for plaintiff in error filed his motion to suppress certain portions of said deposition, which motion was overruled by the court to which ruling counsel for plaintiff in error duly excepted (Rec. 17, 18). Both of said motions were made and overruled the day prior to the day on which the trial commenced.

The deposition was not introduced in evidence and read to the jury until May the 26, or after that date, for the trial did not commence until the twenty sixth day of May, 1891 (Rec. 12).

We do not find that at the time the deposition was offered in evidence upon the trial of said cause on May

26, or after that time, that any objections or exceptions were made to its introduction in evidence. None are shown in the bill of exceptions, or in any other portion of the record. As the record is silent on this point, we must conclude that it was offered and read in evidence without objection or exceptions.

Notwithstanding the fact, that a motion had been made before the trial to suppress the deposition, and had been overruled, it was necessary for counsel for plaintiff in error, to object or except to its introduction in evidence when offered as such, if he desired to keep it out, and to avail himself of any defects in it.

In support of this proposition we desire to call the attention of the court to the case of *Ray v. Smith, 17 Wall (U. S.) 411.* and particularly to the following found on page *417* of same volume:

"But as the case goes back for another trial, it is "proper to notice an exception taken to the refusal of "the court to suppress the deposition of the plaintiff. "The deposition had been taken *de bene esse*, and before "the trial the defendant moved to suppress it. But "when it was offered at the trial, it was read without "objection, and without exception. It may be that had "it been objected to then, it should not have been re- "ceived. But after having permitted it to be read at "the trial without opposition, we think it cannot be ob- "jected now that the court received it."

See also:

Brown v. Tarkington, 3 Wall (U. S.) 381,
Evan v. Hettich, 7 Wheaton (U. S.) 453.

In overruling the motions to suppress the deposition of Dr. W. P. Mills, and also certain parts thereof, we think the court did not commit error. We believe the motions came too late. As we have seen (Rec. 17), that

this deposition was taken on the twelfth day of May, 1891, when counsel for plaintiff in error were present and participated in taking the same (Rec. 20), and had full knowledge of all matters concerning the taking of the same and the contents thereof. No motion to suppress said deposition, or any portion thereof was made until the twenty-fifth day of May, 1891, the day set for the trial of said cause (Rec. 11), though the trial of the cause was not actually commenced until the day following (nevertheless, it was too late to have re taken said deposition, had the court sustained said motion).

York Co., v. Central Railroad, 3 Wall (U. S.), 113.
Doane v. Glenn, 21 Wall (U. S.), 33.
Shutte v. Thompson, 15, Id (U. S.), 161.
Murray v. Larabie, 8 Montana, 208.
Howard v. Stilwell & Bierce Manuf'ng Co., 139, (U. S.), 199, 205, and authorities therein cited.

III.

We will next notice the third assignment of error, and which was that the court erred in not suppressing certain portions of the deposition of the witnesses Mills and DeWitt on the grounds that the same was incompetent and hearsay.

Counsel for plaintiff in error urge this as the most serious objection contained in the record. Drs. Mills and DeWitt testified in behalf of defendant in error, plaintiff below, by depositions read upon the trial; certain portions of these depositions were objected to at the time, the objections were overruled by the court, and exceptions saved by plaintiff in error. The error complained

of was that these two witnesses, who were shown to be regular practicing physicians, stated in their depositions which were permitted to be read in evidence over the objections of the plaintiff in error, the defendant below, that on different and divers times while examining the defendant in error, plaintiff below, in order to determine the nature and extent of his injuries alleged to have been received in said accident, the defendant in error had stated to them his pains, sufferings, symptoms and conditions at the times these several examinations were made. These statements of the defendant in error were not made in reference to the manner in which he received his injuries—or as to past events—but were made with reference to his health, feelings, symptoms, pains, aches and conditions at the times that these examinations were made. These examinations were several in number, and were made at different times between the month of October, 1888, and the first of May, 1891.

We contend that this testimony was eminently proper, and that in its admission there was no error. We have examined a large number of authorities, including the decisions of courts of last resort in many states of the Union, and we confidently believe that our position is sustained by the great weight of authority. In fact, we have found no courts of last resort outside of those of New York and Michigan, but what sustain the position contended for by us, and in the two states above named, their courts of last resort have been on both sides of the question. And just here we desire to call attention to an error in brief of counsel for plaintiff in error in quoting a decision of the court of appeals of

New York, and which otherwise might have a tendency to mislead the court. On page 12 of the brief of counsel for plaintiff in error, in quoting from an opinion of Peckham, judge in the case of *Roche v. B., C. & N. R. R. Co., 105 N. Y. 294.*, make Justice Peckham say: "But evidence of simple declarations of a party made some time after the injury, and to a physician for the purpose of being attended professionally, and simply making the statement that he or she is then suffering pain, is evidence of a totally different nature, is easily stated, liable to gross exaggeration, and of a most dangerous tendency, while the former necessity for its admission has wholly ceased." This quotation should read as follows: "But evidence of simple declarations of a party made sometime after the injury and *not* to a physician," etc. etc. We have italicized the word "not," found in the text of the report, but omitted in the extract in the brief of counsel for plaintiff in error, which materially changes the meaning of that portion of Justice Peckham's opinion quoted. It will be seen by this that even the court of appeals of New York holds that this character of evidence is admissible when made to a physician after the injury and for the purpose of treatment.

In support of the proposition contended for by us, we call attention to *1 Greenl Ev.* (14*th ed*) *Sec* 102, *note b*, and cases cited; Mr. Greenleaf says:

"Whenever the *bodily* or *mental feelings* of an individ-
"ual are material to be proved, the usual expressions of
"such feelings, made at the time in question, are also
"original evidence. If they were the natural language
"of the affection, whether of body or mind, they furnish
"satisfactory evidence, and often the only proof of its

"existence. And whether they were real or feigned is "for the jury to determine. So also, the representa- "tion by a *sick person* of the nature, symptoms, and ef- "fects of the *malady* under which he is laboring at the "time, are received as original evidence. If made to a "medical attendant, they are of greater weight as evi- "dence; but if made to any other person, they are not "on that account rejected."

In support of the above the learned author cites:

Insurance Co v. Mosley, 8 Wall (U. S.), 397;
Bacon v. Charlton, 7 Cush (Mass), 581;
Hatch v. Fuller, 131 Mass, 574;
State v. Howard, 32 Vt., 380;
Sanders v. Reister, I Dakota Ter., I51;
Elliott v. Van Buren, 33 Mich, 49;
Twole v. Blake, 43 N. H., 92;
Taylor v. Grand Trunk R. R. Co., Id. 304;
Rodgers v. Crain, 30 Texas, 284.

To which may be added quite a recent case decided by the Supreme Court of Massachusetts, that of *Fleming v City of Springfield*, decided October, 1891, and reported in the *I54 Mass., 520*. The opinion was delivered by Morton, J., and speaking for the court he said:

"The testimony of Dr. Rice was properly admitted. "The statement made by the plaintiff purported to be a "description of his symptoms at the time it was made, "and not a narration of something that was past; and it "may be fairly inferred that it was made for the pur- "pose of medical advice and treatment. At any rate, "although it was only a day or two before, or possibly "during the trial it does not appear that such is not "the case."

As we have seen, Mr. Greenleaf says that if made to a medical attendant, they are of greater weight as evi-

dence; but if made to any other person, they are not on that account rejected.

On this proposition, see

Aveson v. Lord Kinnaird, 6 East, 188;
I. Ph. Evid. 191;
Gray v. Young, Harp. 38;
Gilchrist v. Bale, 8 Watt, 355, 34 Am. Dec. 469.

The authorities last above cited are, we believe, clearly applicable to the testimony of the witnesses Lombard and Choquette (Rec. 26), and rendered their testimony admissible, and that there was no error committed in the admission of their testimony.

Upon the general proposition of the admissibility in evidence of the declarations and utterances of an injured or sick person made after receiving an injury, or while suffering from sickness, we will cite some further authorities:

In *Gray v. McLaughlin, 26 Iowa, 279*, Beck, J., speaking for the court says:

"But her declarations as to the nature and character "of her suffering and sickness, should have been admitted in evidence. The expressions of one suffering "from bodily pain and illness, relative to his health, are "admissible in evidence, being the natural consequences "and usual indications of suffering and sickness."

And cites *1 Phillips E.*, (Cowen & Hills and Edwards' notes.

Also see

Central Railroad v. Smith, 76 Ga. 209, 2 Am. St. Rpt. 31;

Fay v. Harlan, 128 Mass., 244;

Kennard v. Burton, 35 Me. 39, 43, Am. Dec. 249;

Quaife v. C. & N. W. R. Co., 48 Wis., 513, 33 Am. Rpts. 821;

Birmingham U. Ry. Co., v. Hale, (Ala.) 8 Southern Rpt. 142;

M'Keigue v. City of Janesville, N. W. Rept. (Wis.) 298;

Armstrong v. Incorporated Town of Ackley, 32 N. W. Rpt. (Iowa) 180.

"When such declarations are evidence, they may be "proved by any witness who heard them; they are of "greater weight if made to, and proved by a medical "attendant."

Howe v, Plainfield, 41 N. H., 135;

Perkins v. Concord R. Co., 44 N. H., 223.

In all instances where it is pertinent to show the bodily or mental feelings of a person, the natural expressions of such feelings made at the time in question are, as to the facts in issue, regarded as original evidence. Such expressions usually furnish satisfactory evidence, and it is the province of the jury, to determine what degree of credence should be accorded them.

Phillips v. Kelly, 29 Ala., 628.

We do not think it necessary to pursue this question further than to say, that we think the admissibility of this testimony was clearly settled by this court in the case of *Insurance Co. v. Mosley, 8 Wallace, 405.*

It is contended, however, by counsel for plaintiff in error, that the examinations made by Drs. Mills and DeWitt, were made solely for the purpose of enabling

them to testify as witnesses on the trial of this action (record, pp 19 and 20). We submit that there is not one word in evidence in the record that goes to support any such assertion. The defendant in error, himself testifies as to his injuries (Rec. p 21). He also testifies that on November 25, 1888, he underwent an examination made by Drs. Mills, Henke and DeWitt. And another examination by Drs. DeWitt and Mills on December 11, 1888, and was subsequently examined in January, 1889, and on the twenty third of November, 1890, for the purpose of finding out from what injuries he was suffering (Rec., p 22). Here were four medical examinations during a period of two years. It certainly did not require these physicians two years' time and four medical examinations, to enable them to testify as witnesses in this case. If it did, then they must certainly have well understood the condition of their patient, and their testimony should have been favorably considered by the jury in estimating the amount of damages, of which plaintiff in error so greivously complains.

It is also shown by the testimony of Dr. W. P. Mills (Rec., p 19), that he was treating the defendant in error in November, 1888, and examined him in his office at that time.

We will, however, before leaving this branch of the case, call attention to the evidence of C. W. Lombard (Rec., 26). By reference to this testimony it will be seen from the record, page 26, that all of the testimony of this witness went in without any objections or exceptions on part of the plaintiff in error, except the answer to one question which is as follows:

"I will ask you to state if at the time he stated where "in his pain was, or in what manner he was distressed?"

To this question an objection was interposed for the reason that it did not appear that the witness was a physician, etc., but the court overruled said objections and allowed the witness to answer. In this ruling we see no error, and what has been said as to this character of evidence under this the third assignment of error is properly applicable to the testimony of this witness.

IV.

The fourth assignment of error contained in the record is that the court erred in permitting that portion of the deposition of Dr. Mills to be read in evidence wherein he stated that at the time he and Drs. Henke and DeWitt examined the defendant in error, he furnished some expectoration for examination by Dr. Henke under the microscope, which showed pus, blood and mucus (Rec. 18), for the alleged reason that it was hearsay.

In answer to this we say that the court did not err; that there was no hearsay at all about the matter. Dr. Mills did not claim that Dr. Henke ever told him anything at all about the result of his microscopic investigation of the expectoration, if any ever was made, or that he, Mills, ever knew what the result was, if any was made. Dr. Mills told what he evidently saw with his own eyes, that was that defendant in error did furnish some expectoration which showed blood, pus and mucus, for Dr. Henke to examine under the microscope. What the result of Dr. Henke's examination with the

microscope was, if any, we do not know, as no evidence has been introduced on that point. What we claim is, that Dr. Mills did not say—or intended to be understood as saying—that the presence of pus, blood and mucus was only discernable by aid of the microscope, but on the contrary, he said, and intended to be understood as saying, that defendant in error furnished some expectoration which showed blood, pus and mucus, to be examined by Dr. Henke under the microscope. Why Dr. Henke desired to examine it by the aid of the microscope we do not know; probably for some scientific purpose, or to determine whence the blood came.

This is the first time that we ever heard of a doctor starting out with a microscope to discover pus, blood and mucus in expectoration, and it is entirely due to the fertile imagination of counsel for plaintiff in error that the discovery was ever made.

V.

We will now examine the fifth assignment of error. It is claimed that the court erred in permitting counsel for defendant in error to ask the witness, Dr. Mills, certain questions on the re direct examination, which had no reference to any thing brought out on his cross examination. We will admit that the general rule of evidence requires the re examination to be confined to such matters as may have been brought out on his cross examination, and a party has no right, strictly speaking, to re examine him on any new matter, but the matter rests largely in the discretion of the trial court, and when the party re examines such witness, on any new

matter, the other party has a right to cross examine the witness concerning such new matter. And unless the trial court has abused its discretion in allowing a re-examination, it is not a material error. And in the case at bar, there was no such abuse, and the plaintiff in error could not have been injured thereby. See:

State v. Rorabacher, 19 Iowa, 154;
Walker v. Walker, 14 Ga., 242;
People v. McNamara, 94 Cal., 509;
Hollingsworth v. State, 79 Ga., 605;
Riley v. State, 88 Ala., 193;
Snodgrass v. Com. (Va.) 17 S. E. Rpt. 238;
Swift v. Ratliff, 74 Ind. 426;
City of Springfield v. Dalby, 139 Ill., 34.

VI.

The sixth assignment of error relates to the admission of alleged incompetent testimony on a leading question put to the witness Dr. Mills (Rec. 20).

We are well aware that leading questions should not, as a rule, be asked on examination in chief. There are however, exceptions to this rule, and the entire matter is largely within the discretion of the trial court, and unless it appears from the record that there was a flagrant abuse of discretion by the trial court, then there was no prejudicial error.

See:

Whiting v. Mississippi, etc., 76 Wis., 592;
Bundy v. Hyde, 50 N. H.. 116;
Addison v. State, 48 Ala., 478;
Walker v. Dunspaugh, 20 N. Y., 170;

Farmers, etc., Co., v. Groff, 87 Pa., St. 124;
Parker v. Georgia, etc., Co., 83 Ga., 539.

Judgment will not be reversed because leading questions permitted, in the absence of a palpable abuse of discretion by the trial court.

Whiting v. Mississippi, etc., 76 Wis., 592;
Oberlate v. Edgar, 28 Neb., 70;
Hunsinger v. Hofer, 110 Ind., 390 and Goudy v. Werbe, 117 Ind., 154, 157.

So far is the matter of examination considered within the discretion of the court, that the allowance of leading questions has been held not to be the subject of a writ of error.

Donnell v. Jones, 13 Ala., 490;
Parmlee v. Austin, 20 Ill., 35;
State v. Lull, 37 Me., 246;
Green v. Gould, 3 Allen (Mass.), 465;
Smith v. Hutchings, 30 Mo., 380;
Severence v. Carr, 43 N. H., 65 and Doran v. Mullen, 78 Ill., 342.

Counsel for plaintiff in error say that counsel for defendant in error resorted to this ingenious method to endeavor to show to the jury that their client was worse in cold than he was in warm weather. That "the case "was to be tried in the last days of the balmy month of "May, just when the life giving heats of summer were "setting in." Very pretty indeed. That "unfortunately the appearance of their client was against the recovery of any very substantial verdict. Outwardly and "visibly, he appeared to be in as good health and as "sound, physically, after the accident as he had been

"prior to it, with the possible exception of a broken "tooth, which a dentist could restore in a very short "time at a very trifling cost." We beg pardon of the court for intruding so much of the argument of counsel for plaintiff in error upon it, and only do so for the purpose of showing how counsel for plaintiff in error are in the habit of going outside of the record and perverting the facts and testimony. Where in the whole record is any evidence that would or will warrant the foregoing statement in regard to the healthy and physical condition of the defendant in error at the time of trial—there is not in the whole record one single sentence of evidence that sustains it.

On the trial of the cause the record, page 21, shows that the defendant in error personally appeared in court and was sworn as a witness in his own behalf in said cause; the jury saw him, and saw his personal appearance and heard him testify, and therefore, had an opportunity of judging from his then personal appearance, whether he appeared in good health and sound, or whether he had the appearance of then suffering from the effect of his injuries alleged to have been received in said accident. It has been contended by counsel for plaintiff in error in their brief that there was no evidence in the record to show that the defendant in error was better in warm weather than in cold. In this assertion we claim that they are mistaken. As to what the answer of Dr. Mills was to the question which is the ground of this assignment of error, we are not informed, for it is not included in the record. It may have been in favor of defendant in error, or in favor of plaintiff in error. But outside of this answer, we claim that there

was evidence before the jury tending to prove that the defendant in error was better in warm weather than he was in cold weather. In Record, page 19, Dr. Mills testified as follows:

"That his condition was better in June, 1890, when "he last examined him, than it had been in the previous " December."

VII.

The seventh assignment of error alleges that the court erred in admitting certain testimony which it is claimed was introduced for the purpose of aggravating the damages to be found by the jury. The defendant in error was on the stand testifying in his own behalf, when his counsel asked him the following question: "What was your condition at that time?" (Rec., 22). Ans.—"A gathering of water inwardly." This answer was objected to for the reason that it appeared to be based upon the opinion of the witness, etc. The objection was overruled, and an exception taken. In this we find no error. There was no objection to the question, nor any motion to strike the answer out. It was hardly responsive to the question, but we see nothing really wrong with the answer, or in what manner the plaintiff in error was injured thereby. In arguing this question counsel grow facetious and unconsciously develop a hidden fount of wit and humor, which if properly utilized, would fill an aching void and long felt want in the field of humorous literature, and earn for them a reputation second only to that of Mark Twain or Max O'Rell.

It is claimed that this testimony of the defendant in error, and also that of Dr. J. B. Atchinson who was also called to testify on behalf of defendant in error, was for

the purpose of aggravating the damages, and to prove special damages not alleged in the complaint. We cannot agree with counsel on this proposition. This testimony was introduced to show to the jury what the extent of the injuries of the plaintiff in error were, in order that they might correctly determine the amount of his damages if they should find for him. They call special attention to the testimony of Dr. J. B. Atchison, and say we were trying to prove by him special damages not alleged in the complaint. That we were trying to prove that "insiduous and most pernicious of all injuries, *a railroad spine.*" And an attempt to show our client not only a "physical, but a mental wreck," and were trying to prove injuries other than those alleged in our complaint. It will aid us if we refer to the complaint and see what injuries we do allege. On page 5, of the printed record we find in the complaint that the defendant in error alleges that by reason of said accident he "was crushed, bruised, mangled, wounded, "one of his teeth was fractured and broken, his ribs in "his left side were frac ured and broken, *and he other-*"*wise received severe and dangerous wounds and internal* "*injuries,*" and alleges his suffering bodily pain and anguish of mind, and that in consequence of said injuries his general health has been ruined, and that he is permanently disabled and rendered totally unable to attend to any kind of business, etc. We think the allegation that the defendant in error "*otherwise received* "*severe and dangerous wounds and internal injuries*" is sufficiently broad to admit of the testimony of Dr. Atchison relative to the injury to the spine. The only special damages claimed by the defendant in error was

for loss of his grocery business, and that seems to have been abandoned on the trial, and no evidence was offered in support of such claim. He alleged that he received injuries to his person—and proof was introduced to sustain the allegations relative to such injuries, and if an examination showed that his spine was injured then the evidence was proper under the averments of the complaint. And if the injury to the spine would have a tendency to weaken the lower portions of the body, or to affect the brain, or other organs of the body, then it would be the direct result of the injury received in the accident. We desire to say here that the record, page 25, shows that Drs. Atchison, Bullard and Steele testified in this action, and while it does not appear from the record how or under what circumstances they made the physical and surgical examination of the defendant in error on or about the twenty sixth of May, 1891, we venture the information that they did so under the order of the court on the application of the plaintiff in error.

No objections or exceptions were taken to the charge of the court to the jury, and from that fact, we presume that it correctly stated the law of the case and was satisfactory to the plaintiff in error. We particularly call attention to that portion of the charge on the latter part of page 30 and top of page 31, of the printed record on the question of damages, and submit that the testimony of the defendant in error—and that of Dr. J. B. Atchison—is in perfect harmony with said charge.

VIII.

The eighth assignment of error is, that the court erred in not allowing the plaintiff in error to cross ex-

amine the defendant in error, as to the value of the stock of goods carried by him in the grocery business, which he was conducting just prior to the occurrence of the accident by which he was injured.

On cross examination counsel for plaintiff in error asked the witness, the defendant in error, in reference to the grocery business which he had testified that he had been carrying on just prior to the date of the accident, the following question: "How much stock did you "carry on an average about in that business?" This was objected to by counsel for defendant in error for the reason that it was not proper cross examination and that the defendant in error—plaintiff below—had not been permitted to go into the details of such grocery business on the examination-in chief; which objection was sustained by the court, and the witness was not required to answer—said question, to which ruling plaintiff in in error—defendant below—duly excepted (Rec. 23).

In this ruling, we do not believe there was any error.

It is true that the plaintiff had alleged in his complaint special damages that he had sustained by reason of having been compelled to relinquish his grocery business on account of his injuries (Rec. 6). This allegation of the complaint was specifiedly denied by the amended answer of the plaintiff in error (Rec. 10), and the matter was thus put directly in issue and required proof on the part of the plaintiff below—defendant in error here—to sustain it. In support of this allegation no proof whatever was introduced.

It is true that while the plaintiff below—the defendant here—was on the stand testifying as a witness in his own behalf he said in a general way that: "at the time "of receiving the injuries complained of, he was in the "grocery business, and that prior to that time, had been "in the lumber business" (Rec. 22). But there was not one word of evidence that we can find in the record, introduced proving, or tending to prove, that he had been compelled to give up, or abandon his said grocery business, or that he had suffered any loss in said business, and as far as we can find from the record, the claim for special damages on account of the loss of said grocery business, was abandoned on the trial of the cause.

We claim that as no evidence was given in support of said claim for special damages, the court committed no error in sustaining the objection to said question propounded on cross examination, for the reasons hereinbefore stated.

"The rule is now considered by the Supreme Court "of the United States to be well established, that a party "has no right to cross examine any witness, except as "to facts and circumstances connected with the matters "stated in his direct examination; and that if he wishes "to examine him on other matters, he must do so by "making the witness his own, and calling him, as such, "in the subsequent progress of the cause."

Greenl Ev. (14 ed) Sec. 445.

"The cross examination of a witness must be limited "to the matters stated in his direct examination; and if "the adverse party desires to examine him as to other "matters, he must himself subsequently call the witness "to the stand."

Houghton v. Jones, 1 Wall, 702;
Wells v. Russell, 100 U. S., 621.

Philadelphia & T. R. Co., v. Simpson, 14 Pet. 448:

"The course and extent of a cross examination of a "witness is very largely subject to the control of the "court, in the exercise of a sound discretion; *and the "exercise of that discretion is not reviewable on a writ of "error.*"

Rea v. Missouri, 17 Wall, 532.

IX.

The ninth and tenth assignments of errors contained in the record are directed to the admission of alleged incompetent testimony of the witnesses Toner and Anthony. Their testimony, with the objections and exceptions thereto, will be found on pages 23, 24 and 25, of the printed record. These witnesses were called and testified as to the condition of the cross ties in the railroad of the plaintiff in error, at the point where the accident occurred in which defendant in error was injured, and was in substance as follows, as shown by the printed record, pages 23, 24 and 25: Toner testified that he lived in the immediate vicinity of the place where the accident occurred; that his business was ranching—a name usually applied to farmers in Montana. That about 9:30 next morning he was at the scene of the accident; and examined the condition of the railroad track and ties at the point where the accident occurred; that the railroad iron was about 6 or 7 feet apart—spread out—for a distance of three or four car lengths; that a majority of the cross-ties were rotten; that he walked over a good many of them, but that there were men there at work replacing said track; that he had

walked over the ties the evening before the accident happened.

Counsel for the defendant in error asked him to state whether or not a person passing over them could see whether the ties were rotten or not. To this, counsel for plaintiff in error objected for the reason that it was calling on the witness for an opinion. The objection was overruled, and an exception taken. We think the objection was properly overruled, for if the ties were rotten as he had just testified that they were, he certainly was in a position to say whether their rottenness could be seen by walking over them or not. The record shows that he was permitted to, and did answer the question, but as the printed record does not contain his answer, we have no means of determining what it was, or to whom it was favorable, and we cannot indulge in favor of any presumptions in the absence of the answer to the question.

Upon re-direct examination he was asked if he knew whether or not these ties were sound enough to hold spikes if there was any pressure, or anything of that kind brought against the spikes?

This question was objected to for the reason that it was calling for an opinion of the witness, and that he had not been sworn as an expert. The court overruled the objection and an exception was taken.

The record shows that the witness was allowed to answer the question but as the record does not contain the answer, we are left in the dark also as to what this answer was.

We do not believe that any error was committed by

the court in overruling said objection. We believe that any man of common understanding can tell the difference between sound and rotten wood, or between a sound and a rotten cross-tie, and can also tell if it is too rotten to hold a railroad spike. That these are matters concerning which any ordinary individual can testify.

Geo. Anthony also testified that he was mining at Pioneer, but had a ranch near the scene of the accident; that he remembered the date of the accident and was at the scene of it on the fourth of July; that at the time he was there, there were some new ties and some old ones in the track at the point where the accident occurred; (this was three or four days after the accident), that he had traveled over the track in that vicinity three or four times that summer going to his mines, and had noticed the condition at the place where the accident occurred.

Counsel for defendant in error then asked the witness the following question: "What was the condition of the "ties then?" Counsel for plaintiff in error objected to this question for the reason that it appeared from the testimony of the witness that the time he had passed over the track was too remote to allow his testimony to be admitted, and that it was irrelevant and immaterial. The court overruled this objection and an exception was taken.

We say there was not in our opinion any error in such ruling. The witness had testified that he passed over this identical track and place *three or four times that summer* Yet the records show on pages 5, 21 and 28, that the accident occurred on or about the first day of July, 1888. Now it is a fact of general knowledge that

the summers in Montana do not commence before the first day of June, and such being the case, if the witness had passed over that particular track three or four times that summer—and this evidence is not controverted then he must have passed over it three or four times during the month of *June*, immediately preceding the accident, and the time was not too remote as claimed by counsel for plaintiff in error.

The witness in answer to said question said that the condition of a good many of them was very bad; that they were so *rotten as to be visible to the naked eye*. And so *rotten that he could kick them to pieces*. That such rotten ties were in about a mile of the road that he traveled over, but that he could not say that there were any such rotten ties in the road at the point where the accident occurred; *that there were many rotten ties there* but not so rotten as he had seen above and below the switch.

The counsel for plaintiff in error moved to strike out the testimony of the witness as related to rotten ties seen at other points than at the point where the accident occurred—this motion was overruled by the court, and an exception taken.

We think the court properly overruled the motion; in the first place no grounds were given or reasons assigned why such testimony should be stricken out, and we believe the rule to be, that when no grounds or reasons are given for an objection or motion, such objection or motion will not be considered by the court as having been made. Courts have a right, and are entitled to know on what grounds an objection or motion is based.

The motion was properly overruled for the further reason, that the witness says he passed over about a mile of said track in which he saw rotten ties both above and below the switch—that there were rotten ties at the switch—but not so rotten as above and below it. It appears from his testimony that there were rotten ties in the road the entire length of the mile he traveled, but at the place of the accident—which seems to be within the limits of the mile of track that he traversed, the ties were not so rotten as above and below that point.

XI.

The eleventh assignment of error is addressed to the admission of the testimony of the witness Choquette. This witness testified that he was a physician residing and practicing his profession in the town of Missoula, where the defendant in error resided and had been his family physician. No objections were made to the admission of the testimony of this witness until counsel for the defendant in error asked witness the following question: "I will ask you whether or not you have seen "him do any work or labor, or engaged in any business since the accident?" (Rec. 27).

To this question counsel for plaintiff in error objected, for the reason that it was immaterial and irrelevant, the question being of the ability of the defendant in error to perform labor. This objection was overruled by the court and an exception taken.

In this ruling of the court we fail to find any error. It is not claimed in the record that this testimony was in any wise incompetent, but only immaterial and irrelevant—and if that was all we fail to see how the

plaintiff in error was in any wise injured thereby. But we claim that it was material as tending to prove by a witness who had the opportunity of knowing facts going to corroborate the defendant in error who had testified that since the accident he had done little or no work or business for the reason that he had been incapacitated by reason of his injuries. (Rec. 22.)

The eleventh assignment of error is also addressed to the examination of the defendant in error when called as a witness in rebuttal. (Rec. 27.)

Counsel for defendant in error asked him the following question: "State whether or not since your accident "and the receipt of your injuries you have attempted to "do work or perform labor, or transact business?" To this question counsel for plaintiff in error objected for the reason that it was not rebuttal of any new matter brought out by plaintiff in error, which objection was overruled by the court, and an exception taken by counsel for plaintiff in error.

We think the court's ruling on this objection was correct, and that no error was committed in so doing. Whether it was rebuttal or not, we have no means of determining from the record, for no portion of the evidence introduced on the part of the plaintiff in error, defendant below, is embodied in the bill of exceptions preserved by plaintiff in error, nor contained in any portion of the printed record, and in the absence of this, we must conclude that the court ruled correctly—at any rate, it was a matter already within the discretion of the trial court. The witness answered the question as follows: That he had tried to do garden work, and that

when he did he was used up for two or three days; that he had tried to do a little business and sell town lots, but had not engaged in anything else.

XII.

The twelfth assignment of error alleges that the court refused to give one instruction offered by the plaintiff in error, and this is claimed as error: The instruction refused was in the following words:

"The court instructs the jury that even if you should "believe from the evidence that there were rotten ties, "in the road or track at other points than at the par- "ticular point where the train left the track, this is not "sufficient to find that the defendant was negligent in "this case." (Rec. 27.)

We cannot believe that the court committed any error in refusing to give this instruction, as we are confident that the point covered by this instruction was clearly and amply covered by the instructions given by the court, and that the attention of the jury was fully called to the point in question.

Th court in instructing the jury in this case, after calling their attention to the issues involved, one of which was as to whether the cross-ties in the road-bed of plaintiff in error at the point where the accident occurred, were defective or rotten, whether the plaintiff in error was guilty of negligence in keeping the road in repair at that point, and whether the accident was caused by defective and rotten ties at the point of accident, gave the jury the following instruction :

"In considering this issue you are called upon to de- "termine from the evidence, First—As to whether or

"not the cross ties of defendant's track *at the point where* "*the derailment occurred*, or any number of them, *were* "*decayed and rotten*. If you find that they *were*, then, "Second—You are called upon to tetermine whether or "not the derailing of said cars constituting a portion of "said train occurred on account of *these rotten ties*.

"If you should find that said derailment occurred on "account of *said rotten and decayed ties*. Third—Then "you are called upon to determine whether or not de "fendant carelessly or negligently allowed or permitted "said cross-ties to remain in and constitute a portion of "its track at said *point*." (Rec., 28 29).

"You will observe that you are to determine whether "or not defendant carelessly or negligently allowed said "cross ties to remain in and constitute a portion of its "track *at said point*, for if it did not carelessly or neg "ligently permit this, it is not liable, although the "accident should have occurred on account of this." (Rec. 29).

The court at the request of the defendant—the plaintiff in error—gave the following instruction:

"The court instructs the jury that if you should "find from the evidence that the accident by which "plaintiff suffered the injuries complained of by him "resulted from the negligence of defendant and from "the decayed, defective and rotten condition of the cross "ties in defendant's railroad *at or near the point where* "*the train was derailed*, then you will find for the plain "tiff, and you will assess his damages at such reasona "ble sum as will compensate him for the injuries and "suffering thus sustained and no more." (Rec. 31).

It is claimed by counsel for plaintiff in error that the said refused instruction should have been given for the reason that counsel for defendant in error, in order to conceal the paucity of their evidence, with reference to there being rotten ties in the railroad track at the point where the derailment occurred, had deftly introduced testimony as to rotten ties at other and remote points

from the scene of the accident and at times long prior to its occurrence.

As to the paucity of the evidence as to rotten ties at the point of accident we respectfully call attention to the evidence of the witness Toner, on pages 23 and 24 of the printed record, and of Anthony, on pages 24 and 25 of same, and to the evidence of the defendant in error on page 21 of said record. We do not see what more conclusive evidence of the rotten condition of the cross-ties at the place of the accident could be wanted.

As to evidence of rotten ties at other and remote points from the scene of the accident, and at times long prior to its occurrence we say that the only testimony of rotten ties at any other times and places than at the scene of the accident and at the time thereof, is the testimony of the witness Anthony (Rec., pp. 24 and 25), and we candidly submit that the times that he testified to seeing them, must have been three or four times during the month immediately preceding the accident, and that he saw rotten and decayed ties in about one mile of said railroad, both above and below the place of the accident, and also at that place. In other words he says there were rotten ties in a mile of said road, and that mile included the place where the accident occurred. We think the instructions given by the court completely covered the point and that the plaintiff in error could not have been injured by the refusal of the court to give said instruction.

If anything further was required to show that the jury's attention was sharply called to the point covered by the said refused instructions, it is only necessary to